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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~180~~ 138

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

ANTHONY REYBOLD.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF DELAWARE.

FILED OCTOBER 1, 1888.

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vs.

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IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF DELAWARE.

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1 State of Delaware to the judges of the superior court of the State of Delaware in and for New Castle county, Greeting:

Seal of the Court of Errors and Appeals, Delaware.

Because in the record and proceedings and also in the giving of judgment in a certain action which was in the superior court aforesaid, before you, between The Delaware City, Salem and Philadelphia Steamboat Navigation Company, defendant below, plaintiff in error, *vs.* Anthony Reybold, pl'ff below, defendant in error, manifest error hath intervened, to the great damage of the said The Delaware City, Salem and Philadelphia Navigation Company, &c., as by his complaint we are informed, and we, being willing that the error or errors (if any there be) should in due manner be corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you that, if judgment be thereupon given, you send to our court of errors and appeals, to be held at Dover, on the first Tuesday of January next, distinctly and openly, under your seal, the record and proceedings aforesaid, with all things touching the same, as fully and largely as before you they be and remain, together with this writ, that we may further cause to be done thereupon for correcting the errors aforesaid what of right and according to the laws of the State of Delaware ought to be done.

Witness the Honorable Willard Saulsbury, our chancellor, at Dover, the third day of June, in the year of our Lord one thousand eight hundred and eighty-five.

Issued, 1885, Dec. 14.

JAS. BURCHENAL,
Clerk of the Court of Errors and Appeals.

HIGGINS & SPRUANCE, *Attorneys.*

2 STATE OF DELAWARE, *New Castle County,* } *To wit:*

[SEAL.] At a superior court of the State of Delaware begun and held at the city of Wilmington, in and for the county of New Castle, on Monday, the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Among the record and proceedings of said court, with others, is the following, to wit:

ANTHONY REYBOLD
v. } 97.
THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY.

Gray, Higgins.

Be it known that heretofore, to wit, on the thirty-first day of October, in the year of our Lord one thousand eight hundred and eighty-

two, of the November term, A. D. 1882, the said Anthony Reybold, by George Gray, Esq., his attorney, sued forth out of the superior court of the said State the writ of the State of Delaware of summons in case, directed to the sheriff of New Castle county, in the words following, to wit:

NEW CASTLE COUNTY, *ss:*

The State of Delaware to the sheriff of New Castle county, Greeting:

We command you that you summon the Delaware City,
3 Salem and Philadelphia Steamboat Navigation Company, late of your county, corporation, so that it be and appear before the judges of our superior court, at Wilmington, on Monday, the twenty-seventh day of November next, to answer Anthony Reybold of a plea of trespass on the case, &c.

And have you there then this writ.

Witness the Honorable Joseph P. Comegys, Esquire, at Wilmington, the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

GEORGE A. MAXWELL,
Prothonotary.

Issued October 31st, 1882.

At which mentioned Monday, the twenty-seventh day of November, in the year aforesaid, and the day of the return of the aforesaid writ, comes into court the said plaintiff, by his attorney aforesaid, and the sheriff of New Castle county aforesaid, to whom the said foregoing writ was in form aforesaid directed, and makes return thereof to the court here thus endorsed, to wit:

"Summoned William Reybold personally, president of the Delaware City, Salem and Philadelphia Steamboat Navigation Company, Nov. 17th, 1882.

So answers—

PHILIP R. CLARK, *Sheriff.*"

And thereupon, on motion of the Delaware City, Salem and
4 Philadelphia Steamboat Navigation Company, by its attorney, Anthony Higgins, Esq., it is ordered by the court here that the said Anthony Reybold declare against it, the said The Delaware City, Salem and Philadelphia Steamboat Navigation Company, in the plea aforesaid *in* judgment by the court here will be rendered against him in default thereof.

Whereupon, on the first day of February, A. D. eighteen hundred and eighty-three, the said plaintiff, by his attorney aforesaid, declared against the said defendant in the plea aforesaid in the words following, to wit:

The Delaware City, Salem and Philadelphia Steamboat Navigation Company, a corporation of the State of Delaware, was summoned to answer unto Anthony Reybold in a plea of trespass on the case upon promises, &c.

Whereas the said defendant, on the — day of ——, one thousand

eight hundred and eighty-two, at the county aforesaid, was indebted to the said plaintiff in the sum of five thousand dollars, lawful money of the United States of America, for the work, labor, care, and diligence of the said plaintiff by him before that time done, performed, and bestowed in and about the business of the said defendant and at his special instance and request; and also in the further sum of like money for divers goods, wares, and merchandise by the said plaintiff to the said defendant before that time sold and delivered at its like special instance and request; and also in
5 the further sum of five thousand dollars, like money, for so much money by the said plaintiff before that time lent and advanced and paid, laid out, and expended to and for the use of the said defendant and at its like instance and request; and also in the further sum of five thousand dollars, like money, for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and, being so indebted, it, the said defendant, in consideration thereof, afterward, to wit, on the day and year last aforesaid, at the county aforesaid, undertook and then and there promised the said plaintiff the said several sums of money in this count mentioned when it, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant hath not paid the aforesaid several sums of money or any part thereof to the said plaintiff, although often requested so to do, but to pay the same the said defendant hath hitherto altogether refused and doth still refuse so to do, to the damage of the said plaintiff in the sum of ten thousand dollars; thereupon he brings suit, &c.

(Signed) GEORGE GRAY,
Attorney for Plaintiff.

And thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here that the said defendant answer to the said declaration aforesaid or judgment by the court here will be rendered against it, the said defendant, by default thereof.

6 Thereupon, on the tenth day of March, A. D. eighteen hundred and eighty-three, the said defendant, by its attorney aforesaid, answers to the declaration of the said plaintiff in the plea aforesaid in the words following, to wit: 1st, non-assumpsit; 2d, payment; 3d, set-off, and, 4th, act of limitations.

Whereupon it is ruled by the court here that the said plaintiff reply to the said pleas of it, the said defendant, or judgment will be rendered against him by default thereof; whereupon replications and issues.

MEMO.—May 7th, A. D. 1883.—The above suit, by order of the plaintiff's attorney, marked to the use of Philip Reybold.

May term, 1883.—Continued, with leave to amend on both sides.

November term, 1883.—Continued.

May term, 1884.—Continued.

And now, to wit, this fourteenth day of November, A. D. 1884, by

leave of the court, the plaintiff, by his attorney aforesaid, files his bill of particulars in this cause in the words following, to wit:

First. Money had and received by the defendant in this cause to and for the use of the said plaintiff to a large amount, to wit, the sum of ten thousand eight hundred and ninety-eight dollars and eighteen cents, with legal interest thereon from the time the said defendant so had and received the same, to wit, from the
7 twenty-ninth day of August, A. D. 1882, said sum of money having been paid by the United States of America to the said defendant for the pilotage and hire or services of a certain steam vessel, to wit, "The Swan," formerly owned by the said defendant, and the said plaintiff being at the time of said payment and ever since entitled, as agent — the said defendant, to receive said money so paid as aforesaid.

Second. Money due and owing at the time of the commencement of this cause from the said defendant to the said plaintiff to a large amount, to wit, the sum of five thousand dollars, for the work, labor, care, and diligence of the said plaintiff before that time done, performed, and bestowed in and about the business of the said defendant at the request of the said defendant, to wit, in and about the prosecution of a certain claim of the said defendant against the United States of America, amounting to a large sum of money, to wit, five thousand seven hundred and ninety-six dollars and thirty-six cents, for the pilotage and hire or services of a certain steam vessel, to wit, "The Swan," formerly owned by the said defendant.

(Signed) GEO. GRAY,
EDWARD G. BRADFORD, JR.,
Attorneys for Plaintiff.

November term, 1884.—Continued, on the application of the defendant, on the ground of the absence of a material witness.

And now, to wit, this 26th day of May, A. D. 1885, thirty
8 jurors having been by the sheriff of New Castle county duly summoned, returned, and empannelled, out of which number a jury, to wit, William H. Bracken, Samuel C. Vail, Robert Wadsley, Charles E. Countiss, Joseph M. Pierce, George W. Goodley, Andrew Fleming, Samuel H. Derrick, Joseph Powell, Ebenezier Watson, Robert Naylor, and John T. Webb, being duly drawn, and, after all cause of challenge allowed, did appear at the bar; and, being duly sworn and affirmed to well and truly try the issues joined and a true verdict give according to their evidence, upon their oaths and affirmations respectively do say they find for the plaintiff and assess his damages at the sum of three thousand one hundred and seventy-nine dollars and eighty-one cents, with six cents costs, besides the costs in this suit expended, &c.

Judgment Nisi.

Therefore it is considered by the court here that the said plaintiff recover against the said defendant as well the sum of three thou-

sand one hundred and seventy-nine dollars and eighty-one cents, the damages assessed by the jurors aforesaid, as the sum of six cents, besides the costs in this suit adjudged by the court unto the said plaintiff, on his assent, for his costs and charges by him about his suit in that behalf expended; and the said defendant in mercy, &c.

And thereupon the said defendant prays leave to except to the opinion and direction of the court, and that the court would sign and seal the said bill of exceptions according to the statute in such case made and provided.

Whereupon the said defendant comes into court here and files its bill of exceptions, duly signed and sealed, in the words following, to wit:

In the Superior Court of the State of Delaware, Sitting in and for New Castle County.

ANTHONY REYBOLD
vs.
THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY.

No. 97. November Term, 1882. Case.

Bill of Exceptions.

At the trial of this cause, at the May term, 1885, it was proved that the defendant company had a claim against the United States for the pilotage and hire of the steamboat Swan, formerly owned by the defendant, and that the plaintiff, then a director of said company, brought said claim to the attention of the directors at a meeting of the board held in 1876 or 1877, and urged that it should be collected by the company.

There was evidence on behalf of the plaintiff that the other directors at said meeting replied that said claim was worthless; that there was no use of throwing good money after bad, and they declined to prosecute the same for the company; and thereupon, at the request of the plaintiff, there was an understanding or agreement between the board and the plaintiff that if he would undertake the collection of said claim he might have what he could get from it, provided the company should be at no expense in the matter.

Several witnesses for the defendant, two of whom were present at said meeting, testified that there never was any such understanding or agreement between the board of directors and the plaintiff.

There was evidence on behalf of the plaintiff that he was never a director of said company after May 3, 1877, and that he never was a stockholder in said company after October 1, 1880.

There was evidence on behalf of the plaintiff that after said meeting the plaintiff got from the treasurer of the company certain books and papers of the company for the purpose of obtaining the facts in relation to said claim, and that then and afterwards the plaintiff did certain work and incurred certain expenses in collection of evidence as to said claim and in the prosecution of the same.

At a meeting of the board of directors held Dec. 5, 1878, the following letter was received from the plaintiff:

"To the president & directors of the Del. City, Salem & Philada. Steamboat Company:

GENTLEMEN: You once told me that if I could collect the deduction made by the Government on the charter of the steamer Swan I might have it. Do you still say so?

Yours respectfully,

(Signed) ANTHONY REYBOLD."

The following is an extract from the minutes of said last-mentioned meeting:

"A letter was read from Anthony Reybold asking whether this company would adhere to a promise heretofore made him giving him the fruits of any deduction from the Government charter of the steamer Swan. Answered that they would confirm and adhere to any previous promises made to him."

The following is an extract from the minutes of the next
11 meeting of the board of directors, held March 6, 1879:

"The minutes of the last meeting, Dec. 5, were read and adopted."

At a meeting of the board of directors held April 7, 1881, the following letter was received from the plaintiff:

"PHILADA., *Mar. 29th*, 1881.

To the president and board of directors of the Delaware City, Salem and Philadelphia Steamboat Navigation Co.:

GENTLEMEN: The claim against the Government in favor of the steamer Swan and due your company has been given me by your board to enable me to collect the same. My council advises me to get from the company a bill of sale.

You will greatly oblige and assist me in the collection of the same by complying with the request and fixing the amount at a nominal sum, say one dollar."

Respectfully,

(Signed) ANTHONY REYBOLD."

At said last-mentioned meeting the following resolutions were adopted:

"On motion, resolved that the president or treasurer of this Co. be authorized to file a claim against the U. S. Government for any balance due this company on account of the steamer Swan and collect the same."

"On motion, resolved that the president or treasurer of this company shall be empowered to make a contract with any person for the recovery of any claim due from U. S. Government to this company."

"A communication was received and read from Anthony
12 Reybold asking this company to convey to him by bill of sale the company's claim against the U. S. Government on account of steamer Swan. Ordered filed."

The plaintiff testified that at the date of the said last-mentioned resolutions he had prosecuted the said claim to the stage when the Government was ready to pay the money over to the claimant. The plaintiff also testified that up to the time of his receiving notice of the passage of the said last-mentioned resolutions he had received no intimation from any officer or member of said company or any other person that there was any objection to his collecting said claim on his own account.

There was evidence on behalf of the plaintiff that after he had received from the treasurer of the company certain books and papers in relation to said claim, as aforesaid, and before the adoption of said last-mentioned resolutions, the said treasurer, at the request of the plaintiff, from time to time signed papers required in the prosecution of said claim, and that the plaintiff, a short time before the adoption of the said last-mentioned resolutions, sent by a messenger to the said treasurer a paper to be signed and an affidavit to be made thereto, to be presented to the Government, concerning said claim, but the said treasurer refused to sign it or to make the affidavit to it unless the plaintiff would agree to apply the amount which he should receive on said claim to a debt of the plaintiff to the Farmers' Bank for which the said treasurer was personally bound as surety.

On the part of the defendant there was evidence that said treasurer made affidavit to a paper in prosecution of said claim shortly after the said meeting of the directors held April 7, 1881, and that
13 before that time no paper to prosecute said claim was executed by the treasurer, nor was any action taken by the directors authorizing any such paper to be executed.

The plaintiff testified that all the work he performed and all the expenses he incurred in and about the prosecution of the said claim he did for his own individual benefit, under the expectation of getting the money for himself and not for the company and not under or because of any promise of the company to pay him for such work or expenses, and that the company did not make him any such promise on behalf of the plaintiff.

THOMAS I. HILYARD testified that at a meeting of the stockholders in 1876 or 1877 the plaintiff brought up the matter of this claim of the company against the Government for the steamer Swan, and asked "why the collection of it was not made," and that Thomas Clyde, in the chair, replied that "the matter was not worth contending for, and that there was no use of throwing good money after bad," and that that was the general sense of the meeting, and no objection was made by any person.

It was testified by witnesses for the defendant, who were stockholders, that they had attended all of the meetings of the stockhold-

ers and had never heard the subject-matter of the said claim brought before the stockholders.

EDWIN C. REYBOLD, one of the stockholders before and since 1876, further testified that he had never been a director of the company, and that he never heard of the said claim until after the meeting of the directors on April 7, 1881, when they determined to collect the claim for the company.

14 There was evidence that the directors of the company in 1877 held 442 shares of the capital stock of the company out of a total of 615 shares at that time issued, and that the directors, on December 5, 1878, held 742 shares out of a total of 915 shares at that time issued.

It was further proved that the treasurer of the company, on September 1st, 1882, received, through the counsel of the company, from the Government the sum of $2,753.18, being the proceeds of said claim less all expenses attending the collection thereof.

And thereupon the defendant's counsel prayed the court to instruct the jury as follows:

1. The directors of a corporation have no right to give away the property of a corporation without the consent of all of the stockholders.

2. The directors of a corporation have no right to give away a claim of the corporation or the proceeds of the same without the consent of all of the stockholders.

3. To make such gift valid requires the consent or ratification of all of the stockholders.

4. Where it does not appear that the stockholders expressly consented to or ratified such gift, such consent or ratification cannot be implied without proof that the knowledge of such gift was brought home to all of the stockholders.

5. It is the duty of the company to rescind an unexecuted
15 contract or gift if the same is *ultra vires* or prohibited by law.

6. A contract or transfer of property by a corporation is absolutely void if declared void by the act of incorporation or by a general law.

7. This rule is applicable to a contract or transfer which has been partially or wholly executed by the party contracting with the corporation or receiving from it such transfer.

8. In such case the party dealing with the corporation cannot enforce the performance of the contract or the transfer of the property by the corporation, or recover from it the consideration paid or compensation for the consideration in case it was work and labor.

9. Whether the transaction between the plaintiff and defendant was a gift or transfer to the plaintiff of the claim of the defendant against the United States, or a contract, agreement, or understanding to give or transfer said claim to the plaintiff in the future, or to pay to him the proceeds of such claim when received by the defendant, it is within the provisions of § 3477 of Revised Statutes of the United States and is void, and no action can be maintained against

the defendant for the proceeds of said claim received by it from the United States or any part thereof, or for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of such gift or transfer or as the consideration for such contract, agreement, or understanding.

10. That an agreement by the company to pay for the work and labor of the plaintiff cannot be implied from the facts proved in this case.

11. That the plaintiff is not entitled to recover on the contract claimed by the plaintiff to have been proved or for work and labor performed under it.

12. That the plaintiff is not entitled to recover on a *quantum meruit* for his work and labour performed in the prosecution of said claim.

13. That the plaintiff can recover nothing for money paid for his expenses, &c., as no such claim is made in his bill of particulars.

(A.)

An act to incorporate the Delaware City, Salem and Philadelphia Steamboat Navigation Company.

Be it enacted by the senate and house of representatives of the State of Delaware in general assembly met (two-thirds of each branch concurring):

Corporators.

SECTION 1. That John Reybold, William Reybold, John C. Clark, Barney Reybold, Thomas Clark, Thomas Murphey, and Anthony Reybold, now associated under the name of Reybold, Clark & Co., as the owners of a line of steamboats running between Salem, Delaware City, Philadelphia, and other places on the Delaware river and bay and their tributaries, and such other persons as shall hereafter become stockholders in the said company be, and they are hereby, declared to be a corporation and body politic by the name of "The Delaware City, Salem and Philadelphia Steamboat Navigation Company," and by that name they and their successors and assigns shall and may have continued succession and be capable to sue and be sued in courts of law and equity; to purchase, build, hold, occupy and convey any steamboat or boats, lands, tenements, and real and personal estate whatsoever, which shall be necessary to carry into effect the objects of the said corporation; to have a common seal; to ordain by-laws for their own government, not inconsistent with the laws of this State or the Constitution of the United States, and to enjoy the franchises incident to a corporation: Provided, That the said corporation shall not have or exer-

Name.

May sue and be sued.

May purchase, &c., lands or boats.

Common seal.

Not to exercise banking powers.

cise any banking powers and that their capital stock shall consist of one thousand shares of one hundred dollars each, and the president and directors shall have power from time to time to increase the capital stock to such an amount as may be deemed necessary for the accomplishment of the objects of this corporation: Provided, That the same shall not exceed at any time one thousand five hundred shares at the prices aforesaid.

Capital stock may be increased.

Increase limited.

SECTION 2. And be it further enacted, That the business and concerns of the said corporation shall be managed by seven directors, who shall be stockholders and shall be elected at each annual meeting of the stockholders, which shall be on the first Thursday in May of every year, and shall continue in office until the next succeeding annual meeting and until successors to them shall be duly chosen. The directors shall be chosen by ballot by the stockholders in person or by proxy, who shall have a vote for every share of stock, and a majority of votes given in shall be necessary to a choice. If any director ceases to be a stockholder he shall at the same time cease to be a director, and if any vacancy or vacancies occur by death, resignation, refusal to serve, or otherwise, the remaining director or directors, as the case may be, shall choose one or more directors to serve until the next election in course or until successors shall be duly chosen, and if vacancies shall at any time exist in all the offices of directors the corporation shall not thereby cease, but the business of the corporation may be managed by such persons as may be designated by the by-laws until new directors are chosen by the stockholders. The directors, until the first annual meeting after the passing of this act and until otherwise chosen, shall be John Reybold, William Reybold, John C. Clark, Barney Reybold, Thomas Clark, Thomas Murphey, and Anthony Reybold.

Affairs of company managed by board of directors.

Elected, when.

Directors chosen by ballot.

18

Directors ceasing to be stockholders.

Vacancies, how filled.

Capital stock divided into shares.

SECTION 3. And be it further enacted, That the capital stock of the said corporation shall be divided into shares of one hundred dollars each, and that when or so soon as two hundred shares shall have been subscribed the said corporation may be organized, and for that purpose it shall be lawful for the said Reybold, Clark & Co. to transfer, assign, and convey to the said corporation the steamboat "Major Reybold," with her machinery, furniture, and apparel, together with the lands, wharves, and buildings now held by them, at the

Reybold, Clark & Co. may transfer Major Reybold.

sum or price of — thousand dollars, to be subscribed by them in the capital stock of the said corporation in the number of shares equivalent thereto, and the said steamboat, wharves, lands, and buildings so transferred, assigned, or conveyed shall be deemed, taken, and held as the property of the said corporation; and said directors appointed by this act shall have power to open books for further subscription to the said capital stock, as limited by the first section of this act, at such time or times, place or places, as they or a majority of them shall think proper, giving at least twenty days' notice of the time and place of meeting and of the time of subscription for the said stock.

Directors may open books.

Notice.

SECTION 4. And be it further enacted, That the board of directors for the time being shall have power to elect a president, who shall be a director; a treasurer, and all other officers and agents, and to employ such workmen, artificers, and laborers as shall be necessary to carry into effect and execute all the powers by this act granted to the said corporation, and to allow such compensation as shall be agreed upon, and, if they judge it necessary, to exact and take from their officers and agents bonds for the proper execution of their several duties and trusts and for the faithful performance of their several contracts.

Directors to elect a president, treasurer, and officers.

May take bonds from officers.

SECTION 5. And be it further enacted, That the president shall preside at all meetings of the said corporation, and if absent his place may be supplied by the election of any one of the directors *pro tem.*; that the said directors of the said corporation shall have power by their by-laws to fix, determine, and regulate the prices of transport-ion of passengers, goods, wares, and merchandise, wagons, carriages, horses, cattle, stock of every description, or other articles that shall be transported in the boat or boats of the said corporation, and that the said board of directors shall from time to time declare dividends of so much of the profits of the said corporation as they may deem advisable and pay the same over to the persons entitled thereto.

Power by by-laws.

Directors shall declare dividends.

SECTION 6. And be it further enacted, That if any subscriber or subscribers to the capital stock of the said corporation shall neglect or refuse to pay any instalment or instalments on the number of shares which he or they may have subscribed, or the *the* holders thereof, for the space of twenty

Any subscriber neglect or refuse to pay.

After being called for upon two weeks' notice in newspapers president and directors may declare share forfeited for benefit of company.

days after the same shall have been called for and appointed for the payment thereof by the directors by an advertisement published for the space of two weeks in a newspaper published in Wilmington and one in the city of Philadelphia previous thereto, that in such case the president and directors may declare such share of stock forfeited and sell the same for the benefit of the company, or they may, in the name of the corporation, sue for and recover the sum or sums so remaining unpaid, with costs, and interest thereon, and that such delinquent shall not, during the time that any of the said instalments aforesaid remaining due and unpaid, be entitled to vote at any meeting of the stockholders or receive any dividend thereon.

Delinquent not entitled to vote.

Legislature may amend.

SECTION 7. And be it further enacted, That it shall be lawful for the Legislature at any time hereafter to alter, amend, modify, or repeal this act, and that this act shall continue in operation for the period *for* twenty years and no longer.

J. W. F. JACKSON,
Speaker of the House of Representatives.
M. R. CARLISLE,
Speaker of the Senate.

Passed at Dover February 21, 1859.

Certificate of secretary of state and State seal.

21 I do hereby certify that the foregoing is a true copy of an act of the General Assembly of the State of Delaware entitled "An act to incorporate the Delaware City, Salem and Philadelphia Steamboat Navigation Company," passed at Dover February 21, 1859, the same having been by me compared with the original roll on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office, at [SEAL.] Dover, this twenty-fifth day of February, in the year of our Lord one thousand eight hundred and fifty-nine.

EDWARD RIDGLEY,
Secretary of State.

22 And thereupon the court charged the jury as follows:

1. That the charter of the corporation, defendant, a copy of which is hereto annexed, marked "A," provides "that the business and concerns of the said corporation shall be managed by seven directors, who shall be stockholders and shall be elected at each annual meeting of the stockholders."

The directors had, in virtue of such provision, the right to settle and dispose of the claims of the company the same as any directors have in any company with such powers as these directors had; that the directors of a company, within the defined scope of their authority, are virtually the hand of the company, doing its business.

2. That whatever a corporation may lawfully do can be done by its agents, acting under its authority for that purpose. It appearing that about eight-ninths of the stock of the company was held by its directors, if the jury be satisfied from the evidence that the said directors agreed that the plaintiff should have whatever he could collect from the U. S. Government upon the claim of the defendant against it, he bearing all the expense of the effort for such collection, then there was a valid legal agreement initiated between the parties, which was consummated when the plaintiff expended any money or rendered any service in the prosecution of the claim which but for the understanding with the company he would not have spent or rendered. In other words, that the declaration of the directors, sworn to by witnesses, that if he would proceed for the claim of the defendant and recover anything upon it he might have it was,

23 if the jury believe them, in the nature of an offer on their part which, when accepted by him by acting upon it and expending his time and money in the recovery of the claim, bound the company whose officers they were, such agreement being within the scope of their authority as directors, according to the language and meaning of the charter of the company.

3. That the company could not legally assign its claim, by gift or otherwise, to the plaintiff. Still, if the jury are satisfied from the evidence that he secured it by his efforts and expenditures in the production of the necessary proof, he is entitled to recover upon the count for money had and received, for the money received by the company was his money, and the company cannot be allowed in this action or under such a count to shelter itself under any defence of the illegality of the contract *inter sese*.

4. The plaintiff may recover under the count for work and labor, under the circumstances shown by the proof of the plaintiff, if the jury believe it, such proof being that the directors furnished the plaintiff, upon its request, with the means—through its books and accounts—of prosecuting the claim. If, therefore, the company would avail itself of the fruits of the plaintiff's work and labor and services it should pay him what they are worth—the same as a man who sees another working in his corn-field among other hired laborers should pay him what his labor was worth, if the jury in such case should be satisfied that there was from the circum-

24 stances evidence of a hiring. That the question in the ca e

in hand, as well as in that cited, was for the jury upon the facts proved.

To which said charge of the court to the jury and the refusal of the court to charge the jury as requested by the counsel for the defendant in their prayers for instructions to the jury the defendant, by its counsel, then and there excepted.

And thereupon the chief justice of said court, at the request of the said counsel for the defendant, did sign and seal this bill of exceptions, pursuant to the act of the General Assembly in such case made and provided.

J. P. COMEGYS, *Ch. J.* [SEAL.]

MEM.— June 6th, A. D. 1885, one thousand dollars of the above judgment marked to the use of Edward G. Bradford and George Gray, Esquires.

STATE OF DELAWARE, }
New Castle County } *ss.*:

I, George A. Maxwell, prothonotary of the superior court [SEAL.] of the State of Delaware in and for New Castle county, do hereby certify that the foregoing pages contain a true copy of the whole record and proceedings in the case there stated as the same now remains of record in the said court at Wilmington.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this twenty-eighth day of December, A. D. eighteen hundred and eighty-five.

GEORGE A. MAXWELL,
Prothonotary.

25 To the Honorable Willard Saulsbury, chancellor and presiding judge of the court of errors and appeals of the State of Delaware:

The petition of the Delaware City, Salem and Philadelphia Steamboat Navigation Company, a corporation of the State of Delaware, respectfully represents unto your honor that on the twenty-first day of June, A. D. 1888, a final judgment was rendered by the court of errors and appeals of the State of Delaware at the June term thereof, held in the town of Dover, in said State, on said day, against your petitioner in a suit at law, in which your petitioner was defendant and Anthony Reybold, of the city of Wilmington and State of Delaware, was plaintiff.

Your petitioner further represents that in the said suit there was drawn in question the construction of a clause of a statute of the United States and the decision was against the title, right, privilege, and exemption specially set up and claimed under such clause of the statute, and that there was error in the said judgment of the said court of errors and appeals of the State of Delaware, that being the highest court in said State having jurisdiction of the said suit.

Your petitioner is advised that it is entitled to have the same reviewed and corrected by the Supreme Court of the United States, and respectfully represents to your honor that there is error in the said

judgment of the said court of errors and appeals of the State of Delaware, in that the said decision respecting the construc-
26 tion of a clause of a statute of the United States and respecting the title, right, privilege, and exemption, specially set up and claimed under such clause of said statute was rendered against instead of in favor of your petitioner, as will more fully appear by an inspection of the record of said cause.

Wherefore your petitioner prays your honor to allow it a writ of error to the said court of errors and appeals of the State of Delaware, so that the said judgment and decision therein may be caused to come before the said Supreme Court of the United States, when the whole matter in suit may be reviewed; and your petitioner will ever pray, &c.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY,
By WILLIAM REYBOLD, *President.*

July 20, 1888.—Examined and writ of error allowed.

W. SAULSBURY,
Chancellor and Presiding Judge of the Court of Errors and Appeals.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of errors and appeals of the State of Delaware, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of errors and appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Delaware City, Salem and Philadelphia Steamboat Navigation Company, plaintiff in error, and Anthony Reybold, defendant in error, wherein a title, right, privilege, and exemption was specially set up and claimed under a statute of the United States and the decision was against the title, right, privilege and exemption specially set up or claimed under such clause of the said statute, and a manifest error hath happened, to the great damage of the said The Delaware City, Salem and Philadelphia Steamboat Navigation Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under
28 your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the nineteenth day of July, in the year of our Lord one thousand eight hundred and eighty-eight.

Issued July 19th, 1888.

[Seal of Circuit Court, Delaware.]

E. RODMOND SMITH,
Clerk of the Circuit Court of the United States for the District of Delaware.

29 [Endorsed:] The Delaware City, Salem and Philadelphia Steamboat Navigation Company, plaintiff in error, *vs.* Anthony Reybold, defendant in error. Writ of error.

30 UNITED STATES OF AMERICA, *ss:*

To Anthony Reybold, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of errors and appeals of the State of Delaware, wherein The Delaware City, Salem and Philadelphia Steamboat Navigation Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court of the United States, this nineteenth day of July, in the year of our Lord one thousand eight hundred and eighty-eight.

W. SAULSBURY,
Chancellor and Presiding Judge of the Court of Errors and Appeals.

31 [Endorsed:] The Delaware City, Salem and Philadelphia Steamboat Navigation Company, plaintiff in error, *vs.* Anthony Reybold, defendant in error. Citation.

I certify that on the 23rd day of July, 1888, at Wilmington, in my district, I personally served the within citation on Anthony Reybold, the within defendant, by showing to him the same and at the same time delivering to him a copy thereof.

Dated July 23rd, 1888.

C. M. NEWLIN,
U. S. Marshal.

Sworn to and subscribed before me this twenty-fourth day of July, A. D. 1888.

[Seal of the District Court in Delaware.]

E. RODMOND SMITH,
Clerk U. S. District Court, District of Delaware.

32 In the Court of Errors and Appeals of the State of Delaware.

THE DELAWARE CITY, SALEM AND PHILADELPHIA Steamboat Navigation Company, Defendant Below, Plaintiff in Error,

vs.

ANTHONY REYBOLD, Plaintiff Below, Defendant in Error.

No. 1. January Term, 1886. Writ of Error to the Superior Court for New Castle County.

Assignment of Error.

And thereupon the plaintiff in error above named, by Anthony Higgins and William C. Spruance, its attorneys, come into court here and says that in the record and proceedings aforesaid and in the rendering of the said judgment there is manifest error, in this, to wit:

1. That the said court erred in charging the jury that if the jury should be satisfied from the evidence that the directors of the defendant company agreed that the plaintiff should have what-

33 ever he could collect from the United States Government upon the claim of said company against it, the plaintiff bearing all the expenses of the effort for such collection, then there was a valid legal agreement initiated between the parties, that was consum-ated when the plaintiff expended any money or rendered any service in the prosecution of the claim which but for such understanding the plaintiff would not have spent or rendered.

2. That the said court erred in charging the jury that the declaration of the directors that if the plaintiff would proceed for the claim of the defendant and recover anything upon it he might have it was in the nature of an offer on their part which, when accepted by the plaintiff acting upon it and expending his time and money in the recovery of the claim, bound the company, such agreement being within the authority of the directors under the charter of the company.

3. That the court erred in charging the jury that though the company could not legally assign its claim, by gift or otherwise, to the plaintiff, still if the jury were satisfied from the evidence that the plaintiff secured the claim by his efforts and expenditures in the production of the necessary proof, he was entitled to recover upon the count for money had and received, for the money received was his money, and the company could not under such a count defend itself on the ground of the illegality of the contract.

34 4. That the court erred in not charging the jury according to the prayers of the defendant company.

5. That the court erred in not charging the jury that the directors had no right to give away the property of the corporation or a claim of the corporation or the proceeds of the same without the consent of all the stockholders, and that to make such gift valid requires the

consent or ratification of all the stockholders, as prayed for by the defendant company.

6. That the court erred in not charging the jury that where it does not appear that the stockholders expressly consented to or ratified such gift, such consent or ratification cannot be implied without proof that the knowledge of such gift was brought home to all the stockholders, as prayed for in the 4th prayer of the defendant company.

7. That the court erred in not charging the jury that it is the duty of the company to rescind an unexecuted contract or gift if the same is *ultra vires* or prohibited by law, as prayed for in the 5th prayer of the defendant company.

8. That the court erred in not charging the jury that a contract or transfer of property by a corporation is absolutely void if declared void by the act of incorporation or by a general law, as prayed for in the 6th prayer of the defendant company.

35 9. That the court erred in not charging the jury that the rule aforesaid—that a contract or transfer of property by a corporation is absolutely void if declared void by the act of incorporation or by a general law—is applicable to a contract or transfer which has been partly or wholly executed by the party contracting with the corporation or receiving from it such transfer, as prayed for in the 7th prayer of the defendant company.

10. That the court erred in not charging the jury that in the case of a contract or transfer of property by a corporation declared void by the act of incorporation or by a general law, which has been partly or wholly executed by the party contracting with the corporation or receiving from it such transfer, the party dealing with the corporation cannot enforce the performance of the contract or the transfer of the property by the corporation or recover from it the consideration paid or compensation for the consideration in case it was work and labor, as prayed for in the 8th prayer of the defendant company.

11. That the court erred in not charging the jury that, whether the transaction between the plaintiff and defendant was a contract, agreement, or understanding to give or transfer the claim of the defendant against the United States to the plaintiff in the future or to pay him the proceeds of such claim when received by the defendant, it was within the provisions of section 3477 of the Re-

36 vised Statutes of the United States and was void, and that no action could be maintained against the defendant for the proceeds of said claim received by it from the United States, or any part thereof, or for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of such gift or transfer or as the consideration for such contract, agreement, or understanding, as prayed for in the 9th prayer of the defendant company.

12. That the court erred in not charging the jury that, whether the transaction between the plaintiff and defendant was a contract, agreement, or understanding to give or transfer the claim of the defendant against the United States to the plaintiff in the future or

to pay to the plaintiff the proceeds of such claim when received by the defendant, it was within the provisions of section 3477 of the Revised Statutes of the United States and was void, as prayed for in the 9th prayer of the defendant company.

13. That the court erred in not charging the jury that no action could be maintained against the defendant for the proceeds of said claim received by it from the United States or any part thereof or for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of a gift or transfer of said claim by the defendant to the plaintiff or as the consideration for a contract, agreement, or understanding to give or transfer said claim to the plaintiff in the future, or to pay
37 him the proceeds of said claim received by said defendant from the United States or any part thereof, as prayed for in the 9th prayer of the defendant.

14. That the court erred in not charging the jury that no action could be maintained by the plaintiff against the defendant for the proceeds of said claim received by it from the United States or any part thereof, as prayed for in the 9th prayer of the defendant company.

15. That the court erred in not charging the jury that no action could be maintained by the plaintiff against the defendant for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of a gift or transfer to the plaintiff of the claim of the defendant against the United States or as the consideration of a contract, agreement, or understanding to give or transfer said claim to the plaintiff in the future or to pay him the proceeds of such claim when received by the defendant from the United States or any part thereof, as prayed for in the 9th prayer of the defendant company.

16. That the court erred in charging the jury that the plaintiff could recover under the count for work and labor, under the circumstances shown by the proof of the plaintiff, if the jury believed it, that the directors furnished the plaintiff, upon his request, with means, through its books and accounts, of prosecuting the claim.

38 17. That the court erred in not charging the jury that an agreement by the company to pay for the work and labor of the plaintiff could not be implied from the facts proved in this case, as prayed for in the 10th prayer of the defendant company.

18. That the court erred in not charging the jury that the plaintiff was not entitled to recover on the contract claimed by the plaintiff to have been proved, or for work and labor performed under it, as prayed for in the 11th prayer of the defendant company.

19. That the court erred in not charging the jury that the plaintiff was not entitled to recover on a "*quantum meruit*" for his labor performed in the prosecution of said claim, as prayed for in the 12th prayer of the said defendant company.

20. That the court erred in not charging the jury that the plaintiff could recover nothing for money paid for his expenses, as no

such claim is made in his bill of particulars, as prayed for in the 13th prayer of the defendant company.

W. C. SPRUANCE,
ANTHONY HIGGINS,
Attorneys for Pl'ff in Error.

1886, May 27.—Received and filed.
JOS. BURCHENAL,
C. C. E. Appeals.

39 *Opinion of the Court of Error- and Appeals of the State of Delaware.*

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY, Defendant Below, Plaintiff in Error,
vs.
ANTHONY REYBOLD, Plaintiff Below, Defendant in Error.

January Term, 1886.
Writ of Error to the Superior court of New Castle County.

The action in the court below was assumpsit.

The plaintiff's *narr.* contained two counts—one for money had and received, and the other for work and labor done.

There was no count in the *narr.* upon any special contract. The jury in the court below heard the proof offered in support of these respective counts. They passed upon the sufficiency of that proof. Their judgment on this question was conclusive and final.

This court has no jurisdiction to determine whether their verdict was right or wrong, and no power to review their finding upon a mere question of fact.

This court in affirming the judgment below do so for the
40 reason that the finding of the jury under the second count, for work and labor done, being in favor of the plaintiff below, there was no error in the rendition of the judgment by the court below upon such finding of the jury. The court declines to render any decision upon any other questions raised in the cause in the arguments of counsel, because it considers such questions as irrelevant.

41 Supreme Court of the United States.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY, Plaintiff in Error,
vs.
ANTHONY REYBOLD, Defendant in Error.

— Writ of Error to the Court of Errors and Appeals of the State of Delaware.

Know all men by these presents that we, The Delaware City, Salem and Philadelphia Steamboat Navigation Company, a corporation of the State of Delaware, and William Reybold, of Red Sion Hundred, in New Castle county and State of Delaware, are held and firmly bound unto Anthony Reybold, of said State, in the

full and just sum of six thousand three hundred and fifty-nine dollars and sixty-two cents, to be paid to the said Anthony Reybold or to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this nineteenth day of July, in the year of our Lord one thousand eight hundred and eighty-eight.

42 Whereas the above-named The Delaware City, Salem and Philadelphia Steamboat Navigation Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the court of errors and appeals of the State of Delaware:

Now, therefore, the condition of this obligation is such that if the above-named The Delaware City, Salem and Philadelphia Steamboat Navigation Company shall prosecute its said writ to effect and answer all costs and damages if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY, [SEAL.]
By WILLIAM REYBOLD, *President.*
WILLIAM REYBOLD. [SEAL.]

The above bond is approved this 20th day of July, A. D. 1888.
WILLIAM SAULSBURY,
Chancellor and Presiding Judge of the Court of Errors and Appeals.

43 In the Court of Errors and Appeals of the State of Delaware.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY, Def't Below, Pl'ff in Error, *vs.* ANTHONY REYBOLD, Pl'ff Below, Def't in Error.	Writ of Error from the Superior Court of New Castle County.

And now, to wit, this 21st day of June, in the year of our Lord one thousand eight hundred and eighty-eight, this cause having come on to be heard on the 17th, 18th, 19, & 20th days of January, A. D. 1888, and the same having been debated by counsel on both sides, and having been held under advisement until this day, it is therefore considered by the court that there is no error in the record and proceedings in this case; and it is therefore ordered and adjudged by the court that the judgment below be, and the same is hereby, in all things affirmed, and that the plaintiff in error pay the costs in this case within three months, or that an attachment issue; and it is further ordered that the record be remanded to the court below.

KENT COUNTY, *ss:*

I, Joseph Burchenal, clerk of the court of errors and appeals, do hereby certify that the above and foregoing is a true copy of the decree of said court in the above-stated case.

Seal of the Court of Errors and Appeals, Delaware.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Dover, this 12th day of July, A. D. 1888.

JOS. BURCHENAL, *Clk.*

44 STATE OF DELAWARE, *Kent County,* } *ss:*

I, Joseph Burchenal, clerk of the court of errors and appeals of the State of Delaware, do hereby certify that the above and foregoing is a true and accurate copy of the record in the above-stated case, as full and as large as the same remains of record in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Dover, this 13th day of September, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth (113).

Seal of the Court of Errors and Appeals, Delaware.

JOSEPH BURCHENAL,
Clk of the Court of Errors and Appeals.

45 Supreme Court of the United States.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY, Plaintiff in Error,
vs.
ANTHONY REYBOLD, Defendant in Error.

Writ of Error to the Court of Errors and Appeals of the State of Delaware.

Assignments of Error in the Supreme Court of the United States.

1. That the court below, to wit, the court of errors and appeals of the State of Delaware, erred in not reversing the judgment of the superior court of the State of Delaware for New Castle county on the ground set forth in the first assignment of error in the said court of errors and appeals, to wit:

"1. That the said superior court erred in charging the jury that if the jury should be satisfied from the evidence that the directors of the defendant company agreed that the plaintiff should have whatever he could collect from the United States Government upon the claim of said company against it, the plaintiff bearing all the expenses of the effort for such collection, then there was
46 a valid legal agreement initiated between the parties that was consummated when the plaintiff expended any money or rendered any service in the prosecution of the claim, which but

for such understanding the plaintiff would not have spent or rendered."

2. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the second assignment of error in the said court of errors and appeals, to wit:

"2. That the said superior court erred in charging the jury that the declaration of the directors that if the plaintiff would proceed for the claim of the defendant and recover anything upon it he might have it was in the nature of an offer on their part, which, when accepted by the plaintiff acting upon it and expending his time and money in the recovery of the claim, bound the company, such agreement being within the authority of the directors under the charter of the company."

3. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the third assignment of error in the said court of errors and appeals, to wit:

"3. That the said superior court erred in charging the jury that though the company could not legally assign its claim, by gift or otherwise, to the plaintiff, still if the jury were satisfied from the evidence that the plaintiff secured the claim by his efforts and expenditures in the production of the necessary proof he was entitled to recover upon the count for money had and received, for the money received was his money and the company could not under
47 such a count defend itself on the ground of the illegality of the contract."

4. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the fourth assignment of error in the said court of errors and appeals, to wit:

That the said superior court erred in not charging the jury according to the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth of said prayers of the defendant company as the same appears in the record.

5. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the seventh assignment of error in the said court of errors and appeals, to wit:

"7. That the said superior court erred in not charging the jury that it is the duty of the company to rescind an unexecuted contract or gift if the same is *ultra vires* or prohibited by law, as prayed for in the 5th prayer of the defendant company."

6. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the eighth assignment of error in the said court of errors and appeals, to wit:

"8. That the said superior court erred in not charging the jury that a contract or transfer of property by a corporation is absolutely void if declared void by the act of incorporation or by a general law, as prayed for in the 6th prayer of the defendant company."

48 7. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the ninth assignment of error in the said court of errors and appeals, to wit:

"9. That the said superior court erred in not charging the jury that the rule aforesaid that a contract or transfer of property by a corporation is absolutely void if declared void by the act of incorporation or by a general law is applicable to a contract or transfer which has been partly or wholly executed by the party contracting with the corporation or receiving from it such transfer, as prayed for in the 7th prayer of the defendant company."

8. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the tenth assignment of error in the said court of errors and appeals, to wit:

"10. That the said superior court erred in not charging the jury that in the case of a contract or transfer of property by a corporation declared void by the act of incorporation or by a general law which has been partly or wholly executed by the party contracting with the corporation or receiving from it such transfer the party dealing with the corporation cannot enforce the performance of the contract or the transfer of the property by the corporation or recover from it the consideration paid or compensation for the consideration in case it was work and labor, as prayed for in the 8th prayer of the defendant company."

49 9. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the eleventh assignment of error in the said court of errors and appeals, to wit:

"11. That the said superior court erred in not charging the jury that, whether the transaction between the plaintiff and defendant was a contract, agreement, or understanding to give or transfer the claim of the defendant against the United States to the plaintiff in the future or to pay him the proceeds of such claim when received by the defendant, it was within the provisions of section 3477 of the Revised Statutes of the United States and was void, and that no action could be maintained against the defendant for the proceeds of said claim received by it from the United States or any part thereof or for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of such gift or transfer or as the consideration for such contract, agreement, or understanding, as prayed for in the 9th prayer of the defendant company."

10. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the twelfth assignment of error in the said court of errors and appeals, to wit:

"12. That the said superior court erred in not charging the jury that, whether the transaction between the plaintiff and defendant was

a contract, agreement, or understanding to give or transfer the claim of the defendant against the United States to the plaintiff in the future or to pay to the plaintiff the proceeds of such claim when received by the defendant, it was within the provisions of sec-
50 tion 3477 of the Revised Statutes of the United States and was void, as prayed for in the 9th prayer of the defendant company."

11. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the thirteenth assignment of error in the said court of errors and appeals, to wit:

"13. That the said superior court erred in not charging the jury that no action could be maintained against the defendant for the proceeds of said claim received by it from the United States or any part thereof or for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of a gift or transfer of said claim by the defendant to the plaintiff or as the consideration for a contract, agreement, or understanding to give or transfer said claim to the plaintiff in the future or to pay him the proceeds of said claim received by said defendant from the United States or any part thereof, as prayed for in the 9th prayer of the defendant company."

12. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the fourteenth assignment of error in the said court of errors and appeals, to wit:

"14. That the said superior court erred in not charging the jury that no action could be maintained by the plaintiff against the defendant for the proceeds of said claim received by it from the United States or any part thereof, as prayed for in the 9th prayer of the defendant company."

51 13. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the fifteenth assignment of error in the said court of errors and appeals, to wit:

"15. That the said superior court erred in not charging the jury that no action could be maintained by the plaintiff against the defendant for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of a gift or transfer to the plaintiff of the claim of the defendant against the United States or as the consideration of a contract, agreement, or understanding to give or transfer said claim to the plaintiff in the future or to pay him the proceeds of such claim when received by the defendant from the United States or any part thereof, as prayed for in the 9th prayer of the defendant company."

14. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the sixteenth assignment of error in the said court of errors and appeals, to wit:

"16. That the said superior court erred in charging the jury that the plaintiff could recover under the count for work and labor under the circumstances shown by the proof of the plaintiff, if the jury believed it, that the directors furnished the plaintiff, upon his request, with the means, through its books and accounts, of prosecuting the claim."

52 15. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the seventeenth assignment of error in the said court of errors and appeals, to wit:

"17. That the said superior court erred in not charging the jury that an agreement by the company to pay for the work and labor of the plaintiff could not be implied from the facts proved in this case, as prayed for in the 10th prayer of the defendant company."

16. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the eighteenth assignment of error in the said court of errors and appeals, to wit:

"18. That the said superior court erred in not charging the jury that the plaintiff was not entitled to recover on the contract claimed by the plaintiff to have been proved or for work and labor performed under it, as prayed for in the 11th prayer of the defendant company."

17. That the said court below erred in not reversing the judgment of the said superior court on the ground set forth in the nineteenth assignment of error in the said court of errors and appeals, to wit:

"19. That the said superior court erred in not charging the jury that the plaintiff was not entitled to recover on a '*quantum meruit*' for his labor performed in the prosecution of said claim, as prayed for in the 12th prayer of said defendant company."

W. C. SPRUANCE,
ANTHONY HIGGINS,
Att'ys for Plaintiff in Error.

Endorsed on cover: Delaware court of errors and appeals. No. 480. The Delaware City, Salem & Philadelphia Steamboat Navigation Company, plaintiff in error, *vs.* Anthony Reybold. Filed October 1, 1888.

Office Supreme Court, U. S.
FILED,
JAN 2 1892
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 138.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY,
PLAINTIFF IN ERROR,

vs.

ANTHONY REYBOLD.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF DELAWARE.

BRIEF FOR PLAINTIFF IN ERROR.

ANTHONY HIGGINS,
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Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 138.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

ANTHONY REYBOLD.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

Statement.

This case is brought here on a writ of error to the court of Errors and Appeals of the State of Delaware, it being the highest court in the State in which a decision could be had.

The case was taken to the court of Errors and Appeals on a writ of error therefrom to the Superior court of said State for New Castle county.

This was an action in the Superior court of assumpsit to recover the sum of $2,898.18 and its interest, being the amount received by the defendant (the plaintiff in error, herein called the "defendant") from the United States for the pilotage and hire of the steamboat "Swan," formerly owned by the defendant and chartered by it to the Government during the civil war.

"The following is an extract from the minutes of said last-mentioned meeting:

"'A letter was read from Anthony Reybold asking whether this company would adhere to a promise heretofore made him giving him the fruits of any deduction from the Government charter of the steamer Swan. Answered that they would confirm and adhere to any previous promises made to him.'

"The following is an extract from the minutes of the next meeting of the board of directors, held March 6, 1879:

"'The minutes of the last meeting, Dec. 5, were read and adopted.'

"At a meeting of the board of directors held April 7, 1881, the following letter was received from the plaintiff:

"'PHILADA., *Mar. 29th*, 1881.

"'To the president and board of directors of the Delaware City, Salem and Philadelphia Steamboat Navigation Co.

"'GENTLEMEN: The claim against the Government in favor of the steamer Swan and due your company has been given me by your board to enable me to collect the same. My council advises me to get from the company a bill of sale.

"'You will greatly oblige and assist me in the collection of the same by complying with the request and fixing the amount at a nominal sum, say one dollar.

"'Respectfully,

"'(Signed) ANTHONY REYBOLD.'

"At said last-mentioned meeting the following resolutions were adopted:

"'On motion, resolved that the president or treasurer of this Co. be authorized to file a claim against the U. S. Government for any balance due this company on account of the steamer Swan and collect the same.'

"'On motion, resolved that the president or treasurer of this company shall be empowered to make a contract with any person for the recovery of any claim due from U. S. Government to this company.'

"A communication was received and read from Anthony Reybold asking this company to convey to him by bill of sale the company's claim against the U. S. Government on account of steamer Swan. Ordered filed."

Record, pp. 6 and 7.

By the evidence it appears that the defendant contended the alleged transfer of the claim or of its proceeds was a mere gift and without consideration; that any such attempted gifts by the directors was in excess of their authority under the charter of the company and was void; that the directors, if in fact they attempted to transfer the claim or its proceeds to the plaintiff, did so without any authority from or ratification by the stockholders who were not also directors; that any transfer or assignment of the claim or its proceeds was in violation of section 3477 of the Revised Statutes of the United States and was void; that at the time the company undertook to prosecute the claim on its own behalf the alleged transfer or assignment of it to the plaintiff was not completely executed, but, on the contrary, was in large part still executory; that everything had not been done and completed by the plaintiff which would entitle him or the company, either for its own or his use, to receive from the Government the money claimed. (Record, pp. 5, 6, 7.)

"The plaintiff testified that at the date of the said last-mentioned resolutions he had prosecuted the said claim to the stage when the Government was ready to pay the money over to the claimant. The plaintiff also testified that up to the time of his receiving notice of the passage of the said last-mentioned resolutions he had received no intimation from any officer or member of said company or any other person that there was any objection to his collecting said claim on his own account. (Record, p. 7.)

"There was evidence on behalf of the plaintiff that after he had received from the treasurer of the company certain books and papers in relation to said claim, as aforesaid, and before the adoption of said last-mentioned resolutions, the

Appeals erred in not reversing the judgment of the Superior court on the ground that any recovery in this suit by the plaintiff from the defendant of the money paid by the United States to the defendant on this claim was barred because illegal under the provisions of section 3477, U. S. Revised Statutes.

The writ of error from this Court was allowed on the ground that in the suit there was drawn in question the construction of the above statute of the United States, section 3477, and the decision of the court below "was against the title, right, privilege, and exemption" specially set up and claimed by the defendant under said statute.

FIRST.

The alleged agreement by the directors of the defendant company that they would let the plaintiff have whatever he could collect from the United States Government upon the claim of the defendant against it, provided he bore all the expenses of its collection, was in violation of section 3477 of the Revised Statutes of the United States, was illegal and void, and no action could be maintained upon it.

The statute provides that "all transfers and assignments made of any claim upon the United States or of any part or share thereof or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim or of any part or share thereof shall be absolutely null and void" unless they are executed with certain formalities "after the allowance of such claim, the ascertainment of the amount due, and the issuing of the warrant for the payment thereof."

The plaintiff could not under his contract have prosecuted in his own name and for his own use this claim against the Government in any court or before the Treasury Department (United States *vs.* Gillis, 95 U. S., 407). The court there held that the statute "embraced every claim against the United States, however arising, of whatever nature, and wherever and whenever presented."

A voluntary transfer of a claim against the United States by way of mortgage, completed and made absolute by judicial sale, was held to be within the provision of the statute, and a suit in the Court of Claims against the Government was on that ground dismissed. (St. Paul R. Co. *vs.* United States, 112 U. S., 733.)

In Spofford *vs.* Kirk, 97 U. S., 484, the Supreme Court went further, and, it being a suit against the claimant by his assignee, held that an equitable assignment of a claim against the United States made before the claim was allowed or warrant issued was void under the statute and that the assignee took no interest in the claim and acquired no lien in the fund arising therefrom.

Kirk, having a claim against the United States, employed Hosmer & Co. to prosecute it. Before the allowance of the claim he drew upon Hosmer & Co. two orders, one in favor of J. S. Wharton or order, the other of E. R. Taylor or order, each for $600, "out of whatever moneys may be coming into your hands for me for supplies and damages sustained by the United States Army during the war." These orders were accepted by Hosmer & Co., payable out of any moneys received by them from the United States on the claim, and were indorsed to Spofford for value and in good faith on his part. A warrant having issued for the payment of the claim, and Kirk having refused to indorse it or admit the validity of the orders, Spofford filed a bill to enforce compliance with the orders and acceptances and to enjoin Hosmer & Co. from surrendering and Kirk from receiving said warrant.

The Court (per Strong, J.) held that the orders and acceptances "amounted to an equitable assignment *pro tanto* of the claim of the drawer against the Government," and add:

"The ingenious argument for the appellant is that the orders clothed the respective payees with absolute ownership of the several sums mentioned therein out of whatever moneys might be coming into the hands of the drawees from the United States for the drawer; and it is said that the fund thus specified was unaffected by the orders and had only a potential existence in the drawer's hands until it was received by them, but that from the moment of possession they assumed a trust to administer the fund in accordance with the directions given by the orders, having previously accepted them."

"Another formal statement of the argument is that the orders as drawn and accepted created in equity an absolute and irrevocable appropriation of their contents when collected by the drawees from the drawer's claim against the Government, and that when collected the sums named in the order were held by the drawees in trust for the payees or their assignees. However the argument be stated, the equitable effect of the orders and acceptances, independent of any statutory prohibition, if they had any effect when they were drawn, was to transfer a portion of the drawer's claim against the United States to the payee."

The Court, referring to their ruling in United States *vs.* Gillis, that the assignee could not prosecute the case against the Government, says:

"It is hard to see how a transfer of a debt can be of no force as between the transferee and the debtor and yet effective as between the creditor and his assignee to transmit an ownership in the debt or create a lien upon it."

Quoting the words of the statute, they add:

"It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders,

or other authorities for receiving payment of any such claim or any part or share thereof. *It strikes at every derivative interest in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.*"

"The language of the act is too sweeping and positive to justify us in giving it a limited construction. We cannot say when the statute declares all transfers and assignments of the whole of a claim or any part or interest therein and all orders, powers of attorney, or other authority for receiving payment of the claim or any part thereof shall be absolutely null and void; that they are only partially null and void; that they are valid and effective as between the parties thereto, and only invalid when set up against the Government." "It follows that the orders gave the applicant no interest in the claim against the United States and no lien upon the fund arising out of the claim, and that the bill was rightly dismissed."

The Superior court in their charge to the jury admit the force of this principle, and say "that the company could not legally assign its claim by gift or otherwise to the plaintiff" (p. 11), but assume to distinguish it from the present case. They say:

"If the jury should be satisfied that the directors agreed *that the plaintiff should have whatever he could collect from the United States Government upon the claims of the defendant against it, he bearing all the expense of the effort for such collection*, then there was a valid legal agreement initiated between the parties, *which was consummated when the plaintiff expended any money or rendered any service in the prosecution of the claim*, which but for the understanding with the company he would not have spent or rendered."

The court below further state "that the declaration of the directors, sworn to by witnesses—that *if he would proceed for the claim of the defendant and recover anything upon it he might have it*—was, if the jury believe them, in the nature of an offer on their part, which, when accepted by him by *acting*

upon it and expending his time and money in the recovery of the claim, bound the company."

And again:

"That the company could not legally assign its claim by gift or otherwise to the plaintiff. Still, if the jury are satisfied from the evidence *that he secured it by his efforts and expenditures in the production of the necessary proof he is entitled to recover on the count for money had and received, for the money received by the company was his money, and the company cannot be allowed in this action or under such a count to shelter itself under any defense of the illegality of the contract inter sese.*" (Record, p. 13.)

1. Though not technically or formally an assignment, yet the agreement or transaction as stated by the court below amounted to a "transfer" to the plaintiff of the defendant's claim against the Government, and was prohibited by the statute.

(1.) By the very statement of the court below it was an express agreement in terms by the directors—

"That the plaintiff should have whatever he could collect from the Government upon the claim of the defendant against it."

"That if he would proceed for the claim of the defendant and recover anything upon it he might have it."

The court below further holds that if the plaintiff secured the claim by his efforts and expenditures in the production of the necessary proof, it created an *implied* contract by the company that entitled him to recover upon the count for money had and received, "*for the money received by the company was his money.*"

On what ground can it be contended that an agreement that the plaintiff should have whatever he could collect

from the Government on this claim was not a "transfer" of the claim to him?

Is it that it was a transfer merely of the "proceeds" of the claim, but not the claim itself? To say this is but a mockery of the statute, for what value or substance has a claim except in its proceeds, and with what avail could the statute prohibit the transfer of the "claim" if it did not prohibit the transfer of its "proceeds?"

If the transaction had been put in writing in a formal assignment providing that the plaintiff should have what he could collect from the Government on the claim, if without expense to the defendant, what would such an instrument be but a "transfer," if not, indeed, an assignment of the claim?

Is it, then, contended that it was not a "transfer" of it because it was not so reduced to writing?

It appears, however, from the record that it was put substantially in writing, though not in a formal instrument.

In his letter to the company, read at their meeting on December 5, 1878 (*ante*, p. 3), the plaintiff wrote:

"You once told me that if I could collect the deduction made by the Government on the charter of the Swan I might have it. Do you still say so?" (*Ante*, p. 3.)

The minutes of said meeting, as put in evidence by the plaintiff (*ante*, p. 4), are:

"A letter was read from Anthony Reybold asking whether this company would adhere to a promise heretofore made him giving him the fruits of any deduction from the Government charter of the steamer Swan. Answered that they would confirm and adhere to any previous promises made to him." (*Ante*, p. 4.)

Again the plaintiff, in his letter of March 29th, 1881, to the company (*ante*, p. 1), says:

"The claim against the Government of the steamer Swan and due your company has been given to me by your board.

To enable me to collect the same, my counsel advises me to get from the company a bill of sale." (*Ante*, p. 4.)

Shall it be said, in the face of these written evidences in the plaintiff's handwriting, that there was no transfer of the "claim?"

Or if, *apart from this statute*, the court were right in charging the jury that under the facts, if proved, the court would imply a contract by the company that entitled the plaintiff to recover upon the count for money had and received, "for the money received by the company was his money," did not that amount to an agreement by which this claim and its proceeds were transferred from the company to the plaintiff?

(2.) Even if this transaction was not a "transfer" or "assignment" of the "claim," but, on the other hand, was an "agreement that the plaintiff should have whatever he could collect from the Government upon it," it was prohibited by the words of the statute, which say that transfers and assignments not only of any "claim" shall be null and void, but also "of any part or share thereof or *interest therein*," whether absolute or *conditional*," "and all powers of attorney, orders, *or other authorities for receiving payment* of any such claim or of any part or share thereof."

It will not be disputed that the "agreement that the plaintiff should have what he could collect on the claim from the Government" was a transfer of what he "could collect." Before the agreement he had no such right. After the agreement he did have it. It would be a mere juggle with words to say that this does not amount to a "transfer" from the company to the plaintiff of a valuable right.

(*a*.) Now this right the transfer of which was thus attempted was, if not the "claim" itself, or even "any part or share thereof," certainly an "*interest therein*."

Can it be well contended that the "*right*" "to have whatever he could collect from the Government;" the right to prosecute the claim before the Treasury Department; to collect and present evidence; to obtain a favorable decision, and then take the money constituted no "interest in" the claim?

(*b.*) But this right or "interest" thus secured by this "agreement" is made null and void by the statute, "whether absolute or *conditional*," and it was subject to two conditions:

(1.) It was whatever the plaintiff could collect from the Government, and

(2.) It was upon "his bearing all the expense of the effort for such collection."

(*c.*) The statute also makes null and void all "orders or *other authorities for receiving payment* of any such claim or any part or share thereof" and the "agreement" by which the plaintiff was to "have whatever he could collect," if sustained by the court, would effectually operate as an "authority" by which the plaintiff would receive payment of the claim for a part or share thereof, to wit, whatever he could collect of it.

(3.) The "agreement" was not made (in the language of the Superior court) "valid" or "legal" by reason of any consideration appearing on the record to sustain it.

It was upon the merit imputed by them to the consideration alleged by the plaintiff that the Superior court based their charge to the jury in his favor. They say:

"*He bearing all the expense of the effort for such collection*, then there was a valid legal agreement initiated between the parties, which was consummated when the plaintiff *expended any money or rendered any service* in the presentation

of the claim which but for the understanding with the company he would not have spent or rendered."

And again:

"The declaration of the directors *that if he would proceed for the claim and recover anything upon it* he might have it was in the nature of an offer on their part which, *when accepted by him by acting upon it and expending his time and money in the recovery of the claim*, bound the company."

(*a.*) But the statute says that all transfers and assignments shall be null and void, "*whatever may be the consideration therefor.*"

The consideration on which the plaintiff rests his case, which constitutes both its substance and its merit, is illegal because in violation of both the letter and spirit of this statute, section 3477.

The sole consideration proceeding from the plaintiff was money expended and services rendered by him (for the company) in the recovery of this claim from the United States.

The superior court in their charge to the jury state the consideration in the following phrases:

"*He bearing all the expense of the effort for such collection.*"

"When the plaintiff expended any money or rendered any service in the prosecution of the claim which but for the understanding with the company he would not have spent or rendered."

And again:

"The declaration of the directors *that if he would proceed for the claim and recover anything upon it* he might have it was in the nature of an offer on their part which, when accepted by him *by acting upon it and expending his time and money in the recovery of the claim, bound the company.*"

It thus appears that the very consideration upon which the merit of the plaintiff's case rests was his doing the very thing which the statute prohibited—the perpetration by him of the very mischief which the statute was enacted to prevent.

(*b.*) Wherein is the expenditure of the plaintiff's time and money in the prosecution of the claim any more meritorious than the money advanced by Wharton and Taylor to Kirk on the orders of Kirk, which Spofford bought for full value, and yet the court there did not allow full consideration in money to maintain the attempted transfer.

Spofford *vs.* Kirk, *supra.*

2. The transaction between the plaintiff and the directors was a "transfer" of the claim within the meaning and intent of the statute, because it was in terms and in fact a gift of it by the directors to the plaintiff.

If the agreement were carried out, then the plaintiff would get everything and the company nothing out of the claim. All the rights of the company to profit by the claim went to the plaintiff, and for this the company got from him absolutely nothing. As seen in his letter of March 29, 1881, to the directors, he says: "The claim has been given to me by your board."

He was to be at all the expense and they at none. The prosecution of it was to be of no advantage or profit to them, and of course they would be at no expense if it were not prosecuted; and, while his incurring expense in its prosecution might be, *apart from the statute*, a valid consideration to support their promise that the proceeds should go to him, it did not turn the case into one where he should get the proceeds as "compensation" for his "services."

Neither was it as if for his prosecuting the claim without cost to them, he bearing all the expense, they were to pay him a part of or percentage upon the amount received. It was denuding themselves of all interest in it without any advantage whatever passing to them for it.

Will any one say, then, that this was not such a "transfer" as the statute intended to prohibit?

3. The intention of Congress in the act was to render all claims inalienable alike in law and in equity for every purpose and between all parties, and especially claims within the mischiefs designed to be remedied by the statute.

Spofford *vs.* Kirk, 97 U. S., 489.
Goodman *vs.* Niblack, 102 U. S., 559.

In Spofford *vs.* Kirk, as to the mischiefs the statute was intended to cure, the Court say:

"The question remains whether the act of Congress was not intended to render all claims against the Government inalienable alike in law and in equity for every purpose and between all parties. The intention of Congress must be discovered in the act itself. It was entitled 'An act to prevent frauds upon the Treasury of the United States.' It may be assumed, therefore, that such was its purpose. What the frauds were against which it was intended to set up a guard and how they might be perpetrated nothing in the statute informs us. We can only infer from its provisions what the frauds and mischiefs had been or were apprehended which led to its enactment. One, probably, was the possible presentation of a single claim by more than a single claimant, the original and his assignee, thus raising the danger of paying the claim twice or rendering necessary the investigation of the validity of an alleged assignment. Another and greater danger was the possible combination of interest and influence in the prosecution of claims which might have no real foundation, of

which the facts of the present case afford an illustration. Within our knowledge there have been claims against the Government, interests in which have been assigned to numerous persons, and thus an influence in support of the claims has been brought into being which would not have existed had assignments been impossible. We do not say that the passage of the act was induced by these considerations. It is enough that frauds or wrongs upon the Treasury were possible in either of these ways, and it may be that Congress intended to close the door against both. However that may be, the language of the act is too sweeping and positive to justify us in giving it a limited construction."

In Goodman *vs.* Niblack, where an assignment of all the assignor's property for the benefit of his creditors was held to have passed, whatever might be due him under a contract between him and the Government and was not within the prohibition of section 3477, Rev. Stat. U. S., the Court say as to the mischiefs designed to be remedied by the statute:

"These mischiefs are mainly two:

"*First.* The danger that the rights of the Government might be embarrassed by having to deal with several persons instead of one and by the introduction of a party who was a stranger to the original transaction.

"*Second.* That by a transfer of such a claim against the Government to one or more persons not originally interested in it the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or Congress as desperate cases, when the reward is contingent on success, so often suggest.

"Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the Government and not the parties to the assignment."

No reported case presents so strongly as the present case the mischiefs intended to be cured by the statute.

The plaintiff's own evidence shows that while yet a director of the defendant company, in 1876 or 1877, he

brought this claim to the attention of the directors and urged that it should be collected by the company; that they replied that it was worthless; that there was no use throwing good money after bad, and declined to prosecute it for the company, and then made the agreement relied on by the plaintiff in this case, that if he would undertake the collection of the claim he might have what he could get from it, provided the company should be at no expense in the matter. (Record, pp. 1 and 2.)

The plaintiff thus shows that the Government never would have been vexed with the claim (1) if the entire interest in it had not been transferred to him, and (2) if he had not assumed the entire responsibility for the expense of it.

4. The agreement was in violation of the policy of the statute and therefore void.

Cook *vs.* Pierce, 2 Houst., 502.
Perkins *vs.* Savage, 15 Wend., 412.
Cannon *vs.* Bryce, 2 B. and Ald., 179.
Langton *vs.* Hughes, 1 M. and S., 594.

In Perkins *vs.* Savage it was the duty of the commissioners, if more stock of a railroad company was subscribed for than required by the charter, to apportion the stock among the subscribers to the utmost advantage of the corporation. The defendant received from the plaintiff $3,000 with which to procure subscriptions in the name of various persons for the plaintiff's benefit. The plaintiff sued the defendant for balance of $500 unexpended by him.

The court (per Nelson, J.) say:

"If the case in this contract be illegal, *either as against the provisions or the policy* of the statute, it seems to me quite

clear the plaintiff cannot recover, and the case of Cannon *vs.* Bryce is still stronger. It was there decided that money lent and applied by a borrower for the express purpose of settling losses on illegal stock-jobbing transactions to which *the lender was not a party* could not be recovered back by him. Chief Justice Abbott denies there is any distinction in a court of law between *malum prohibitum* and *malum in se;* that every act is to be considered unlawful which the law has prohibited.

"The act to prevent stock jobbing expressly prohibited making up any difference for not transferring stock or not performing any contract in that respect stipulated to be performed. *The loan of money was not within the act*, but, as it was unlawful *to pay*, it was unlawful *within the policy of the law to furnish the means of payment* with a full knowledge of the object to which the money was to be applied and for the express purpose of that object, and he likened it to the case of the druggist who sold to a brewer for the purpose of being mixed with beer certain drugs which the latter was prohibited by the act of Parliament from mixing with beer. It had been decided that the druggist could not recover for the price of the drugs sold for that unlawful purpose. The cases abundantly show the contract under consideration to be illegal, whether considered a violation of a positive provision of the statutes *or of the spirit and policy of it.* Indeed, this principle is broadly stated in many of the cases already referred to for the purpose of showing the action could not be sustained if the contract was illegal, both parties being *in pari delicto.*"

The argument for the defendant in error on the illegality of the transaction is, in part, that Revised Statutes, section 3477, does not apply to the facts of this case, because the intent of the statute is the protection of the Government and not of the party to the assignment of transfer, and that therefore the assignment or transfer is void only as against the United States and not as against the plaintiff below here.

In answer to this point and the arguments in its support we submit as follows:

The purpose of the statute in the protection of the Government requires that it should be applied by the court to this transaction, and that the plaintiff should not be permitted to recover from the defendant the proceeds of the claim of the defendant against the United States.

This will appear by a brief review of the several decisions upon the statute made by the Supreme Court.

In United States *vs.* Gillis, 95 U. S., 407, it was ruled that a claim against the United States could not be assigned so as to enable the assignee to bring suit against the Government in his own name in the Court of Claims.

In this case one Ryan, having a claim against the United States for cotton belonging to him which had been seized during the late war, assigned it to Gillis, who brought suit in his own name against the United States. After his death, which happened after the suit was brought, his administrator prosecuted it.

The Court, per Strong, J., say :

"So far from giving new potency to assignments and transfers of rights of action, so far from changing the common-law rule that such rights are not assignable, the statute strikes down and denies *any effect* to powers of attorney, orders, transfers, and assignments which were before good in equity *and which a debtor was bound to regard when brought to his notice.*"

In Erwin *vs.* The United States, 97 U. S., 392, it was ruled that the claim of a bankrupt against the United States passed by the assignment in the bankruptcy proceedings to his assignee, and that the latter and not the original claimant was the proper person to sue in the Court of Claims.

Erwin, having a claim against the United States for captured cotton, was adjudicated a bankrupt and brought suit in his own name in the Court of Claims.

The Court say:

"The act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States, applies only to cases of voluntary assignment of demands against the Government. *It does not embrace cases where there has been a transfer of title by operation of law.* The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute is aimed, nor does the construction given by this Court deny to such parties a standing in the Court of Claims."

We have already fully discussed the case of Spofford *vs.* Kirk, 95 U. S., 484 (*ante* pages).

These cases were all brought under review in Goodman *vs.* Niblack, 102 U. S., 556.

One Sloo, having a large claim against the United States, made a general assignment of all his property for the benefit of all his creditors, but with some preferences, among which was a judgment in favor of Goodman. Afterwards Niblack, as administrator of Sloo, received a portion of the money which was recovered from the Government under the said claim, and Goodman filed his bill against Niblack, as the administrator of Sloo, to recover by virtue of said assignment the amount of said judgment.

Niblack demurred to the bill on the ground that the assignment was void by reason of section 3477 Rev. Stat.

The Court held that the assignment of Sloo, being of all his property and for the benefit of all his creditors, was valid, and was not prohibited by the statute.

The Court (per Miller, J.) say the mischief designed to be remedied by the statute are mainly two (*ante* page), and further say:

"The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aims.

"We *held* it did not include a transfer by operation of

law or in bankruptcy, and we *said* it did not include one by will.

"The obvious reason of this is that there can be no purpose in such cases to harass the Government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of his creditors which is made by an insolvent debtor of all his effects differ from the assignment which is made in bankruptcy? There can be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the Government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the act of 1853."

The cases of Spofford *vs.* Kirk, Erwin *vs.* U. S., and Goodman *vs.* Niblack define the limitations placed by the Supreme Court upon the application of the statute, and also define the mischiefs designed to be remedied by the statute and its purpose and policy.

"It does not embrace cases where there has been a transfer of title by operation of law." An assignment under the bankrupt act passed such a claim.

A voluntary general assignment for the benefit of creditors passed such a claim.

Now, how stand the facts of the case now before the Court in respect of these considerations?

If the Government had had to deal in this business with the defendant company alone it would never have been vexed with this case at all, and the sum now in dispute and its equal sum retained by the claim agent for collecting it would have been in the Treasury of the United States today.

The merit of the plaintiff's case, as urged in the court below in evidence and argument, was that he brought the claim to the notice of the company, urged them to collect it, and that they declined to do it, and then gave it to him.

Thus in this case has the Government been "harassed by multiplying the persons with whom it has to deal."

Here "the reward" of the plaintiff below "*was contingent on success.*" The case was so "desperate" that the owner, though urged by the plaintiff, refused "to throw good money after bad" in its prosecution. "The contingent reward, which raised the danger of enlisting improper influences in advocacy of the claim," was not merely a large part; it was absolutely the entire claim.

And was this a case where "the exigencies of the party who held it justified and required the transfer to be made" when they resisted the urging of this very plaintiff to collect it for themselves, and *gave* it to him because they thought it worthless?

Is this not the strongest case yet brought before the courts, where the protection of the Government, apart entirely from how it affects the parties to the suit, requires that the statute should be enforced?

Will it be contended that if the plaintiff knew the statute barred his way from getting the money he would ever have undertaken its collection? On the contrary, it was to break up the buying up of stale and doubtful claims that Congress passed this most meritorious act.

This case cannot be governed, therefore, by the rule applied by the Supreme Court to cases of transmission by act of law, by will, by administration, by assignments for the benefit of creditors, whether in bankruptcy or voluntary.

No limitation upon the application of the statute to the present case can be drawn from the remaining cases upon the subject, viz: Trist *vs.* Child, 21 Wall, 441; Bailey *vs.* The United States, 109 U. S., 432; Hobbs *vs.* McLean, 117

U. S., 567, and Freedman's Savings Co. *vs.* Shepherd, 127 U. S., 494.

In Trist *vs.* Child, Child undertook to recover from the United States a claim for the services of Trist in negotiating a treaty with Mexico, and for these services of his agent and attorney Trist agreed to pay Child 25 per centum of whatever sum Congress might allow as payment of the claim. Congress allowed the claim, and Child's personal representative filed a bill in equity to enjoin Trist from getting from the Treasury the money appropriated by Congress to the payment of the claim until he had complied with his agreement about the compensation and for a decree commanding him to pay Child $5,000.

It was not claimed by Child (as we claim in this case) that the claim against the United States had been given, transferred, or assigned. It was merely a claim of a *lien* for services in its prosecution.

It was *held*, and properly:

1st. "That a mere agreement to pay for services a percentage of what might be recovered from the United States did not create a lien on the fund in the Treasury after Congress made an appropriation for the claim. To make a lien, in addition to Trist's agreement to pay the 25 per cent., there must have been an appropriation of the fund, either by giving an order by Trist on the Treasury or by transferring it otherwise in such manner that the United States was authorized to pay it to Child without the further intervention of Trist."

2d. "There is another consideration fatally adverse to the claim of a lien. The first section of the act of Congress of February 26, 1853, declares that all transfers of any part of any claim against the United States or of any interest therein, whether absolute or conditional, shall be absolutely null and void unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor.

"*That the claim set up in the bill to a specific part of the money*

appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject."

3d. "That the contract, being for lobby services, was against public policy and void."

The case, therefore, decides that the mere agreement to pay 25 per cent. for services created no lien, and without a lien there was no jurisdiction in equity; that even if there was a lien it was void under this statute.

The Court further say:

"The understanding between the elder Child and Trist was a personal agreement. It could in no wise produce the effect insisted upon. For a breach of the agreement the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. If there was no lien there was no jurisdiction in equity."

1. These words are not authority for saying that a suit at law, even upon the agreement between Trist and Child, could be maintained at law against the prohibition of this statute. Such a question could be decided only by a court of law and not in a case arising in the equity side of the court. All they could decide was what in fact they did decide—"that if there was no lien there was no jurisdiction in equity."

2. The distinction between Trist *vs.* Child and the case now before the Court lies in the fact that the agreement there was merely one to pay 25 per cent. of the sum recovered for services. The remaining 75 per centum went to Trist.

Here the agreement set up was not to pay any part of the sum recovered for *services*, it was to give to the plaintiff below the whole recovery. There mutual advantages raised ample consideration on both sides. We certainly do not contend that this statute prohibits the payment by claimants against the United States for services of agents or at-

torneys in the prosecution of such claims; but if the plaintiff below be adjudged to receive all the money recovered from the United States, certain it is in such case he rendered no service whatever for the defendant company. Such a result would in corroboration of his own testimony establish that he worked only for himself.

The case here of a gift of the entire proceeds of the claim or of what counsel on the other side set up of "a personal contract" that the plaintiff should receive the entire proceeds, raises an entirely different question from a mere agreement to receive a *part* of the proceeds in payment for services by which the claimant recovered the bulk of them.

In Bailey *vs.* The United States, 109 U. S., 432, Bailey and two others of England having a claim against the United States for the illegal capture of their steamer and cargo, gave to one Godeffroy a power of attorney to collect this money *for them.*

The Treasury paid the money under this letter of attorney to Godeffroy, who never paid it to the claimants, and they brought a second suit for it in the Court of Claims.

The Court held that the case was not within section 3477, and that the payment to Godeffroy was good and bound his principals.

The Court say:

"If the protection of claimants was at all in the mind of Congress when passing the acts of 1846 and 1853, it is quite certain that the courts should not, *to the injury of the Government*, extend that protection to those that elected not to avail themselves of the provisions of those statutes."

Hobbs *vs.* McLean, 117 U. S., 567, further illustrates the same distinction.

In that case one Peck entered into articles of copartnership with McLean & Harmon for the purpose of carrying out a contract with the United States which he expected to

make to furnish wood and hay for the army. The contract was made between Peck and the United States, and there being a dispute about its performance, Peck filed his petition in the Court of Claims against the United States.

Pending its decision, Peck was adjudicated a bankrupt and Hobbs was appointed his assignee, and ultimately received from the United States the money. McLean & Harmon fearing that Hobbs would distribute the fund among the general creditors of Peck, filed their bill claiming as surviving partners that any balance due them on an accounting be paid them out of the fund so far as it would suffice to pay the same.

Before filing his petition in the Court of Claims, Peck gave his partners notes payable out of the money he might thereafter receive on account of his claim against the United States.

The Court *held:*

1. "That the two partners, McLean and Harmon, who furnished all the money and did all the work, were entitled to be repaid their advances out of the assets of the partnership before payment of the individual creditors of the partner who paid nothing and did nothing to promote the partnership."

2. "As McLean and Harmon had paid in all the money, they were entitled to all the money collected on the judgment, not by reason of any right to priority of payment, nor by reason of any lien, *but because it was their property and no other person had any claim to it.*" * * * "The decree might stand on the ground, while it in fact asserts that the money in controversy was the absolute property of the plaintiffs."

3. "That Sect. 3477, which forbids assignment of claims against the United States or any interest therein, unless under the circumstances therein stated, can have no reference to such a contract as the partnership articles between Peck and the plaintiff. When those articles were signed there was no claim against the United States to be transferred. Peck had at that time no contract even with the

United States, and there was no certainty that he would have one. What is a claim against the United States is well understood. It is a right to demand money from the United States. Peck acquired no claim in any sense until after he had made and performed, wholly or in part, his contract with the United States. Section 3477, it is clear, only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment or may be prosecuted in the Court of Claims. The section simply forbids the assignment of such claims before their allowance, the ascertainment of the amount due thereon, and the issue of a warrant for their payment. When the contract of partnership was made Peck had no claim which he could present for payment or on which he could have brought suit. He therefore had no claim the assignment of which the statute forbids. It is so clear that the articles of partnership do not constitute such an assignment as is forbidden by the section under consideration that it would be a waste of words further to discuss the point." * * *

"We are of opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government (Goodman *vs.* Niblack, 102 U. S., 556). They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing, until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.

"One or both of the sections of the statute which we are now considering have been under the review of this Court in the following cases: U. S. *vs.* Gillis; Erwin *vs.* U. S.; Spofford *vs.* Kirk; Goodman *vs.* Niblack; Baily *vs.* U. S.; St. Paul and Duluth Railroad Co. *vs.* U. S. *In none of them is any opinion expressed in conflict with the views we have announced in this case.*

"Our conclusion, therefore, is that the articles of partnership were not forbidden by the letter or policy of this statute.

"In respect to the papers executed by Peck on July 20th, 1877, by which he agreed to pay $23,000 to Harmon and

$17,000 to McLean, respectively, 'out of moneys' he might 'thereafter receive on account of' his 'claim against the United States Government for contract for wood,' etc., it is plain they confer no new rights on the plaintiffs and take away no old ones. The evidence shows that Harmon and McLean were entitled, under the partnership articles, to the money specified in these memoranda. Peck was therefore only promising to do what on a good consideration he had already by the articles of partnership promised to do. There was no new consideration for these new promises.

"The only office, therefore, which the memoranda performed was to show the amount then due the plaintiffs respectively under the articles of partnership. It would be a strange conclusion to hold that by accepting these papers the plaintiffs lost their right, which they had already acquired under the articles of partnership, to have the money therein mentioned paid over to them when it should be collected by Peck, their copartner. If the obligation assumed by Peck in his articles of partnership was valid and binding, it was not impaired or annulled by the giving and the acceptance of these memoranda."

"From what we have already said in discussing the articles of partnership, it is clear that they were not forbidden by the language or policy of the sections prohibiting the transfer of claims and contracts."

It therefore appears that McLean and Harmon actually earned all the money paid by the United States under the contract; that it was the product of their money and labor; that Peck contributed nothing toward the partnership business, and therefore was entitled to nothing from it; that the partnership articles were signed before the contract was entered into between Peck and the United States.

Here, however, the steamboat Swan, which earned the money claimed of the Government, was the property of the defendant company and not of the plaintiff. He did no work in performance of the service rendered by the company to the United States. His meritorious service is confined entirely to raking up this old claim from dust and oblivion and in starting it on the way to payment by the Govern-

ment, which but for this his interference would have this money in its Treasury to-day. Nor did he do any work whatever under his agreement for the defendant company, but only for himself.

We submit, therefore, that such contracts as this one, the sole and avowed object of which was to get out of the Treasury money which would otherwise remain there, through raking up a stale and abandoned claim, was one of the sorts of transactions to break up which this statute was passed; that this case comes within the interpretation of the statute given in Spofford *vs.* Kirk and the opinions there expressed, none of which, say the court in Hobbs *vs.* McLean, are in conflict with the views expressed in the latter case.

The case of the Freedman's Saving Company *vs.* Shepherd, 127 U. S., 494, does not depart from the rule of construction of the statute as laid down by this Court in Spofford *vs.* Kirk and Goodman *vs.* Niblack.

> In that case Bradley, having purchased certain premises in Washington from the Freedman's Saving and Trust Company, leased them to the Postmaster General for the use of the United States, and mortgaged them to the trust company by deed of trust to secure the unpaid purchase-money, but in this deed of trust did not specifically pledge the rents that might accrue before sale (for default of payment) and possession thereunder.
>
> Bradley then conveyed the premises to Shepherd (for whom he really bought), and also assigned and transferred the lease to the latter with authority to collect the rents.
>
> Afterward Shepherd made a deed of trust of the premises to Taylor, Bacon, and Cross, trustees, to secure his notes for $100,000, with a covenant that all the rents and proceeds of the trust property coming to his hands should be applied to the benefit of the creditors secured by that deed.
>
> Bradley and Shepherd, by deed dated June 21, 1877, pledged the demand against the United States for use

> and occupation of the premises as security for the payment of certain indebtedness to Thompson, trustee, and therein "covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be endorsed and delivered to the trustees named in said trust, and the proceeds thereof be applied to the payment of said indebtedness." * *

To this pledge and agreement Taylor, Cross, and Bacon, the trustees named in Shepherd's deed of the 15th of November, 1876, gave their written assent.

Shepherd obtained a judgment in the Court of Claims in the name of Bradley against The United States, to the use of Taylor, Bacon and Cross, trustees, for rent reserved for the year ending June 30, 1876 and, pending an appeal and before the above judgment was rendered, brought another suit for the rents due in two subsequent years.

Drafts for the rent were issued by the Treasury, payable to the order of Bradley, to the use of Shepherd, to the use of Taylor, Bacon, and Cross, trustees.

The court held on these facts that the rents belonged to Thompson, and that the assignment of the rents made to him on June 21, 1877, by Bradley and Shepherd was not void under section 3477 of the Revised Statutes. The court say:

> "Undoubtedly the lease made by Bradley to the United States created in his favor what, in some sense, was a claim upon the United States for each year's rent as it fell due; and if the statute embraces a claim of such character there could not have been any valid transfer or assignment of it in advance of its allowance which could have been made the basis of a suit by the assignee against the United States or which would compel the Government to recognize the transfer or assignment. It is, perhaps, also true that under some circumstances the assignor, before the allowance of the claim and the issuing of the warrant, may disregard such an assignment altogether.
>
> "But when the Government ascertained the amount

of rent due under Bradley's lease and *with his consent allowed the same to the use of Shepherd for the use of Taylor, Bacon, and Cross, trustees*, we perceive nothing in the words or the policy of the statute preventing Thompson from asserting his rights either against the parties or any of them named in the warrants issued by the Government or against the trust company, the mortgagee of the premises. The object of the statute, as was said in Bailey *vs.* United States, 109 U. S., 432, was to protect the Government and not the claimant and to prevent frauds upon the Treasury, and that an effectual means to that end was to authorize the officers of the Government to disregard any assignment or transfer of the claim or any power of attorney to collect it unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof. Here the officers of the Government chose to recognize the assignment, and of their action neither Bradley nor Shepherd nor Shepherd's trustees can rightfully complain.

"The Government is acquitted of any liability in respect to the claim for rent, for its officers have acted in conformity with the directions, not only of the original claimant, but of his assignee, Shepherd, and of Shepherd's trustees. The simple question is whether the money received from the Government shall be diverted from the purpose to which Bradley, Shepherd, and Shepherd's trustees agreed in writing it should be devoted, namely, to the payment of the debts Thompson holds against Shepherd. This question must be answered in the negative; and in so adjudging we do not contravene the letter or the spirit of the statute relating to the assignment of claims upon the United States."

This case is distinguishable from the one before the Court in many particulars.

It is doubtful if the statute was intended to cover an antecedent mortgage or pledge of rent from the United States growing due and not yet accrued.

The court say :

> " *If the statute embraces a claim of such character*, there could not have been any valid transfer or assignment of it in advance of its allowance."

In the present case an indubitable " claim," stale and abandoned as worthless, was dug up by the defendant, and the sole consideration for the alleged assignment was the expenditure of money and labor by the plaintiff prohibited by the statute in procuring the allowance of the claim by the Government.

In the Shepherd case the court put their decision on the ground that the assignment to Thompson was fully completed and executed and the drafts so allowed by the Treasury.

> " When the Government ascertained the amount of rent due under Bradley's lease and, with his consent, allowed the same to him for the use of Shepherd, for the use of Taylor, Bacon, and Cross, trustees, we perceive nothing in the policy of the statute preventing Thompson from asserting his rights either against all or any of them."

In the present case the alleged gift or transfer never was completed or executed. The plaintiff, in his letter of March 9, 1881, asked the defendant company to give him a " bill of sale " (Record, p. 6); but, instead of complying with his request, the directors merely filed his letter and passed resolutions authorizing their officers to file a claim and collect the same for the company (Record, pp. 6 and 7), and the money was paid to the defendant by the Government, whose officers never recognized or had any knowledge, even, of this alleged gift or transfer.

The transaction in Shepherd's case was, throughout its entire history, in the due, regular, and legitimate course of

business, as was that in Hobbs *vs.* McLean, and the application of the prohibition of the statute would have operated to embarrass what was perfectly innocent and unobjectionable, and not within the mischief intended by the statute to be remedied. Not to apply the prohibition of the statute to the present case would be to enforce a mere oral agreement of uncertain terms—a mere naked gift, not reduced to writing—resting for its legal completeness upon the allegation that it was fully executed and performed on both sides, when the record shows that before it was executed and while it was still executory merely it was repudiated by the resolutions of the defendant company, who collected the claim for themselves, and that the meritorious expenses and services alleged as the consideration by the plaintiff is the very mischief the statute was enacted to prevent.

5. The intention of the statute is further shown by making null and void the transfer of a claim until after it has been allowed, the amount ascertained, and a warrant issued for its payment.

The effect of this provision is to throw all the risk and burden of its prosecution upon the claimant himself. He can vest in no other person either all of it or a part of it, or even a mere interest in it, until it has passed out of the period of prosecution and peril into that of a Treasury warrant to his own order and worth its face the world over.

What becomes of this precaution for the protection of this Government if by a valid agreement the claimant can vest in a stranger the right to every dollar of it the moment the claim is allowed?

6. The law will not enforce an agreement which accomplishes all the mischiefs intended to be remedied by the statute because of the mere form of the agreement. It will not permit to be done indirectly what it prohibits being done directly.

If this contract is held good, then there is a way by which any and every claim against the United States may be alienated by its owner and vested in a purchaser. The parties must carefully avoid a formal "assignment," but need only agree that the purchaser shall have the proceeds, either in whole or in part.

The consideration from the purchaser, then, can be either money or work and labor. In either and in any case the the path through or around the statute is made perfectly plain and easy.

In this respect the case comes directly within the authority of the Newport Bank *vs.* Tweed (4 Houst., 231), where, in respect of an usurious transaction, the court say:

"In no case where there is a lending of money in which the person lending it *either directly or indirectly* takes or contracts for the loan or use of it a higher rate of interest than six per cent. *per annum* can the wit of man devise a plan to cover or conceal it that the court would not unkennel and expose the usury of it and enforce the statute against it."

7. The plaintiff's case is an attempt to enforce an illegal contract and not one to assert title to money arising from an illegal contract.

The claim of the defendant against the Government was a legal and valid one. The only illegality consisted in the attempted transfer of it to the plaintiff before it was allowed and its amount ascertained and in the form required by the statute.

The case therefore differs essentially from those where the *illegal transaction having ended* a contract "subsequent, collateral to, and wholly independent of the illegal transaction upon which the principle contract was founded" has been sustained. Such were the cases of—

Faikney *vs.* Renous, 4 Burr, 20, 69.
Petrie *vs.* Hannay, 3 T. R., 418.
Tenant *vs.* Elliot, 1 Bos. and P., 3.
Farmer *vs.* Russel, *id.*, 296.
Sharp *vs.* Taylor, 2 Phil. Ch. R., 807.
McBlair *vs.* Gibbes, 17 How., 235.
Brooks *vs.* Martin, 2 Wall., 70.
Planters' Bank *vs.* Union Bank, 16 Wall., 449.

The principle of these cases is well illustrated by Brooks *vs.* Martin, where a firm being engaged in buying up soldiers' claims before any scrip or land warrants were issued, in violation of an act of Congress, but the defendant, one of the partners, having in his hands, as the *results* of the business, lands, money, notes, and mortgages, it was held that he could not refuse to account for and divide them on the ground of the illegal character of the *original contract.*

But in the present case the plaintiff has no claim against the proceeds of the claim *except through an illegal contract*, and therefore the case falls within the principle of Thomson *vs.* Thomson, 7 Ves., 470:

"Where there had been a sale of the command of an East India ship to the defendant and as a consideration he stipulated to pay an annuity of £200 to the previous commander so long as he should continue in command of the ship.

"This contract of sale was illegal because prohibited by a statute. Subsequently the defendant relinquished the command and another person was appointed in his place; but under the regulation adopted by the East India Company to prevent the sale of the commands of their ships an allowance was made to the defendant on his retiring of £3,540.

"The bill in this case was filed for the purpose of procuring a decree for the investment of a portion of this fund to satisfy the annuity of £200, praying that the value of it might be ascertained and paid out of the money allowed by the company.

"The objection made was that the contract providing for the annuity was illegal, and a court of equity therefore would not interfere.

"The master of the rolls, Sir William Grant, agreed that the contract was illegal. He admitted there was an equity against the fund if it could be reached by a legal agreement, but observed, '*You have no claim to this money except through the medium of an illegal agreement*, which, according to the determinations, you cannot support.' 'If the case,' he further observed, 'could have been brought to this, that the company had paid this money into the hands of a third person for the use of the plaintiff, he might have received from that third person, who could not have set up this objection as a reason for not performing the trust,' 'but in this instance the money is paid to the party.' 'There is nothing collateral in respect to which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences."

See the discussion of this subject in McBlair *vs.* Gibbs and Brooks *vs.* Martin, *supra.*

The authority of Faikney *vs.* Renous and Petrie *vs.* Hannay have been overruled.

Aubert *vs.* Maze, 2 Bos. & Pul., 371 (per Ld. Eldon).
Cannon *vs.* Bryce, 3 B. & Ald., 179.

8. The plaintiff cannot recover in this case because he has to rely upon an illegal contract.

The principle *exdolo malo non oritur actio* applies to and controls the case.

(1.) The rule is well laid down in Chitty on Contracts, p. 579, 6th ed.:

"Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect, and the test as to whether a demand connected with an illegal transaction be capable of being enforced at law is whether the plaintiff requires to rely on such transaction in order to establish his case."

Leake on Contracts, 771, 774.
Thomson *vs.* Thomson, 7 Ves., 470.
Simpson *vs.* Bloss, 7 Taunt., 240.
Ex parte Bell, 1 Maule & Sel., 751.
Fivaz *vs.* Nichols, 2 C. B., 512.
Taylor *vs.* Chester, L. R., 4 Q. B., 310.
Cannon *vs.* Bryce, 3 B. & Ald., 113.
Begbie *vs.* Phosphate Co., L. R., 10 Q. B., 499.
Aubert *vs.* Maze, 2 Bos. & P., 373.
Pearce *vs.* Provost, 4 Houst., 467.
Perkins *vs.* Savage, 15 Wend., 412.
Nellis *vs.* Clark, 20 Wend., 24.
Collins *vs.* Blantern, 1 Smith's Lead. Cas., 699.

The plaintiff's bill of particulars sets forth as his cause of action the sum of $2,898.18 paid by the United States to the defendant for the pilotage and hire of the Swan, the said plaintiff being, as against the said defendant, entitled to receive *said money.*

It is the very money of the United States they avowedly seek to recover in the count for money had and received.

It is not money paid or contributed by the plaintiff to an illegal venture, nor a share of the profits of an illegal venture, nor money that he has wagered, nor anything that proceeded *from him.*

It is the very money of the United States which the statute says shall not be "transferred" and which he says is his because of his alleged agreement with the directors.

If, then, that agreement is void under the statute, under

the above authorities the plaintiff cannot recover on it either under the common counts on an implied promise or on the special agreement had he sued upon that.

9. After the execution of the illegal contract or purpose the money paid under it, whether as consideration or in performance of the promise, cannot be recovered back, and the rule applies "in pari delicto melior est conditio possidentis."

Leake on Contracts, 774, and cases cited.
Taylor *vs.* Chester, L. R., 4 Q. B., 314.

Hence on this ground also plaintiff cannot recover on the contract for money had and received.

The plaintiff's proof, if accepted as true, went to prove an executory agreement on his part to prosecute the claim to recovery without cost to the defendant and on the part of the defendant to let the plaintiff have the proceeds when paid over by the Government.

The plaintiff, however, declared not upon the special agreement, but on the common counts for (1) money had and received, and (2) for work and labor; but, having proved a *special* agreement, he can only maintain the common counts on the ground that the consideration on his part is fully executed; that while a special contract remains open and unperformed the party whose part of it is unperformed cannot sue in *indebitatus assumpsit* to recover compensation for what he has done until the whole is performed.

Notes to Cutler *vs.* Powell, 2 Smith's Lead Cas., *28.

But even if, as the defendant claims, the plaintiff did not perform all his part of the agreement and the defendant rescinded the agreement before it was performed and while it was still executory upon both sides, still the plaintiff cannot

recover in the count for money had and received, because that count is in *affirmance and not in disaffirmance of the contract.*

He seeks to recover *through* this illegal agreement and is met by the authorities above quoted.

SECOND.

The plaintiff cannot recover under the count for work and labor—

Because the work was done under an illegal contract, namely, the prosecution of a claim against the Government of the defendant for the benefit of the plaintiff.

Cannon *vs.* Bryce, 3 B. & Ald., 179.
Simpson *vs.* Bloss, 7 Taunt., 240.

In Cannon *vs.* Bryce it was held that money lent and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions to which the lender was no party cannot be recovered back by the lender.

THIRD.

The alleged agreement was beyond the powers of the directors to make and does not bind the defendant company.

1. *The agreement was beyond the powers of the directors because it was in violation of section 3477, U. S. Revised Statutes, and by it made null and void.*

A contract or transfer of property by a corporation is absolutely void if declared void by a general law.

2 Morawetz on Corp., sect. 706.

It requires no argument to show that by incorporating an association the legislature does not intend to emancipate it from the general laws of the land.

Ibid., sect. 32.
Thomas *vs.* The West Jersey R. Co., 101 U. S., 86.
Marshall *vs.* Balt. & Ohio R. C., 16 How., 314.
Oscanyan *vs.* Arms Co., 103 U. S., 261.
East Anglican R'y *vs.* Eastern Counties R'ys, 11 C. B., 775 (cited 131 Mass., 263).

2. *Though the fact that a corporation had no legal right to enter into a contract is held in some cases not to be ground for treating such contract void as against an innocent party having no notice of the excess of authority, yet it renders void such a contract as against a party having notice of such excess of authority.*

2 Morawetz, 686.
Mayor of Norwich *vs.* Norfolk R'y Co., 4 El. and Bl., 443.
Davis *vs.* Old Colony R. R., 131 Mass., 260.
Zabriskie *vs.* Cleveland & R. Co., 23 How., 398.
Ashbury R'y & Co. *vs.* Riche L. R., 7 H. L., 668, 684.
Railway Co. *vs.* McCarthy, 96 U. S., 257.
East Anglican R'y Co. *vs.* Eastern Counties R'y Co., 11 C. B., 775. (See 131 Mass., 262.)
West St. Louis Sav. Bank *vs.* Shawnee Co. Bank, 95 U. S., 557.
Monument National Bank *vs.* Globe Works, 101 Mass., 57.
Mining Co. *vs.* Anglo-Californian Bank, 104 U. S., 192.
Zuletas Claim (*In re* London and Exchange Bank), L. R., 5 Ch. App., 444.
Culver *vs.* Reno Real Estate Co., 91 Penna., 367.

In Mayor of Norwich *vs.* Norfolk Railway Company, 4 El. and Bl., 397, 443, Lord Campbell, C. J., said:

"The mere circumstance of a covenant by directors in the name of the company, being *ultra vires* as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it. For example, if the directors of a railway company were to enter into a contract under seal of the company for the purchase of a large quantity of iron rails and to pay for them at a fixed price, as the vender had reasonable grounds for supposing that the rails were wanted for the purpose of a railroad, it would be no defense to an action for the price or for not accepting them that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, there would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known to the covenantee, and he being *in pari delicto*, I conceive that the maxim would apply, *potior est conditio possidentis*. This would be an illegal contract to misapply the funds of the company, and the illegality might be set up as a defense. So if, without any consideration whatever, the directors of a railway company were to put the company's seal to a deed covenanting to pay a mere stranger £1,000 from the funds of the company, in fraud of the shareholder, where the excess of authority with knowledge of both parties is shown by plea, this joint violation of the law, I apprehend, is a bar to the action."

In Zelutas' claim (*In re* London *vs.* Exchange Bank) L. R., 5 Ch. App., 444, the broker of a banking company, acting under the instructions of the directors, bought shares in the company on behalf of the company, and was credited with the price paid by him for the shares in his banking account kept with the company, and the company was afterwards wound up.

Held that the broker was not entitled to prove against the company for so much of the balance due to him as represented the price of the shares. The Court say:

"Of course if this had been a transaction *in any shape within the ordinary course of the business of the company, which an ordinary person going to the company would have supposed to be within the ordinary course of their business*, I should have been the last to say it was a transaction that could not be supported."

Going on to speak of the merits of the case, the Court further say:

"It was just as much in fraud of the company as where there is an ordinary partnership and one of the partners takes the partnership funds and pays a private debt to a person who knows that the partnership funds are applicable to other purposes and not to the private purpose of the partner. Under such circumstances he can be made liable to refund. Mr. Henry was dealing with these directors as agents of this company and these directors were bound to act within the scope of their authority.

"As regards this particular transaction they must be taken to have known that they had no power to act as they did, and Mr. Henry must be taken to have known the same; and they are in the eye of the law in the same position as if the directors, with the knowledge of Mr. Henry, had used the money of the bank to pay some private debt of their own and charged the bank with it."

East Anglican Railways *vs.* Eastern Counties R'ys, 11 C. B., 811, (cited and quoted 131 Mass., 263).

In Macgregor *vs.* Dover & Deal R'y (18 Q. B., 618) the Court of Exchequer Chamber arrested judgment in an action brought by the Dover and Deal Railway Company upon the agreement of a person interested in the Southeastern Railway Company to pay the expenses of an application of the latter to Parliament to authorize it to establish a connecting railway, because "both plaintiff and defendant here must be taken with full knowledge of the powers conferred on the Southeastern Railway Company to have made a contract by which the defendant is to bind the company to do an illegal act; not merely an act which they have no power to do, but an act contrary to public policy and the

provisions of a public act of Parliament." (18 Q. B., 632). In each of these cases the plaintiff had actually incurred and paid the expenses sued for. (Quoted and cited 131 Mass., 264.)

The Supreme Court of the United States have gone further and laid down the rule that it is the duty of the company to rescind an unexecuted contract or gift, if the same is *ultra vires* or *prohibited by law.*

Thomas *vs.* West Jersey R. Co., 101 U. S., 86.

Or even if the contract was executed in Thomas *vs.* The West Jersey R. Co., 101 U. S., 86, it was contended for the plaintiffs that the doctrine of *ultra vires* had no application *because the contract had been executed on their part.* Justice Miller asks:

"Can they found such a right on an agreement void for want of corporate authority and *forbidden by the policy of the law?* To hold that they can is, *in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is its claim to enforcement by the courts.*" *Ibid*, section 691.

"If the delivery of the property was unauthorized and wrongful as against the corporation and its shareholders, and the party receiving the property had notice of the wrong, *he would be liable to the corporation for the loss sustained by it, or at least for the full value of the property misappropriated.*

"This would clearly be the rule where property or funds belonging to a corporation *are transferred by its agents* or used under an agreement which is in excess of the company's charter, and therefore void.

"*Every person dealing with the agents of a corporation is bound to take notice of the company's charter;* and it is settled that no agent of a corporation has authority to enter into a contract which is in excess of the charter or to execute a void contract."

ANTHONY HIGGINS,
W. C. SPRUANCE,
Of Counsel.

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Supreme Court of the United States,

October Term, 1890.

No. 138.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY,

Plaintiff in Error,

vs.

ANTHONY REYBOLD,

Defendant in Error.

In Error to the Court of Errors and Appeals of the State of Delaware.

Brief of Argument on behalf of Defendant in Error.

GEORGE GRAY,
EDWARD G. BRADFORD,
Counsel for Defendant in Error.

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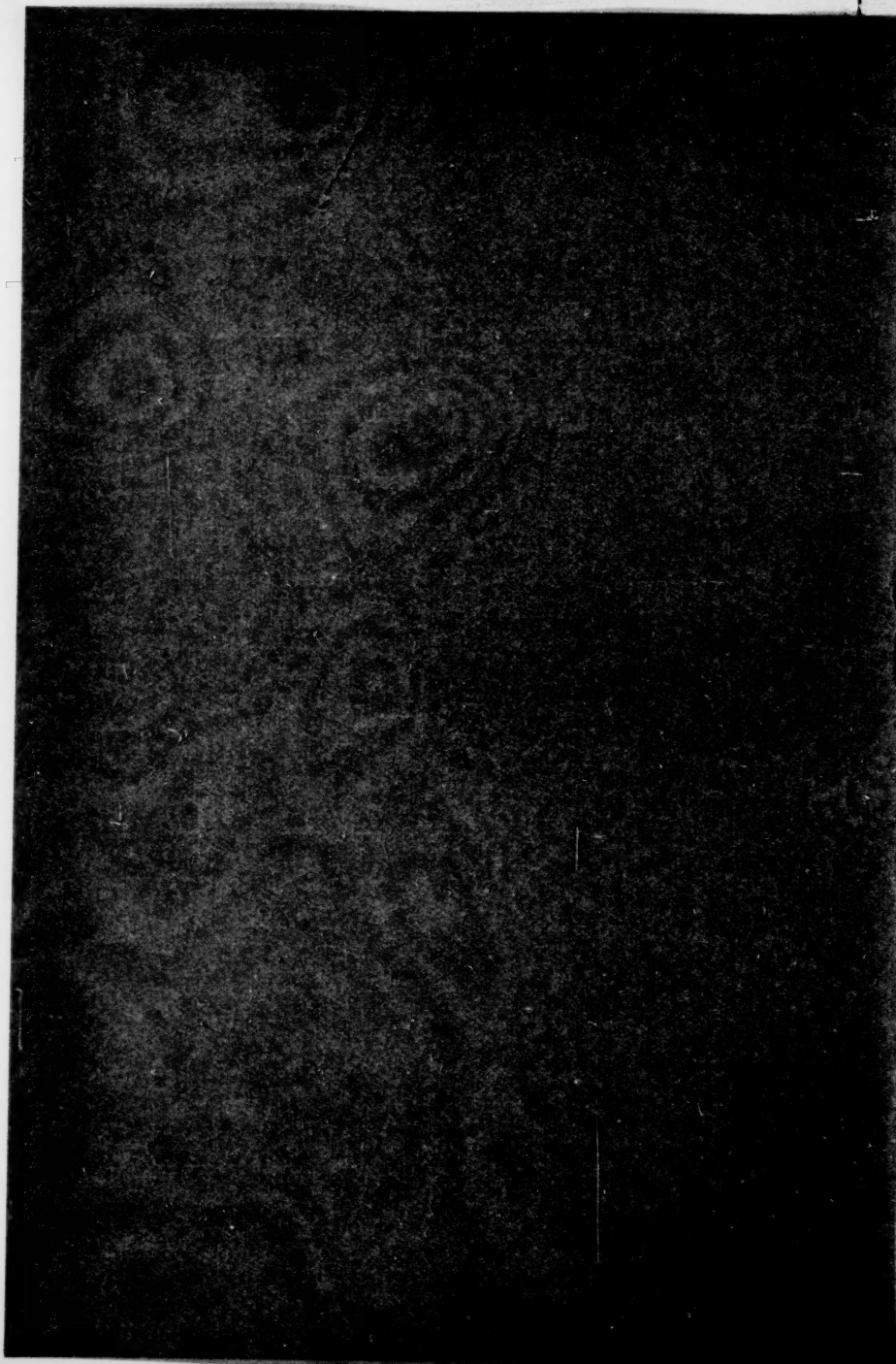

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 138.

THE DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY, PLAINTIFF IN ERROR.

vs.

ANTHONY REYBOLD, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF DELAWARE.

BRIEF OF ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

I

THE WRIT OF ERROR IN THIS CASE SHOULD BE DISMISSED FOR WANT OF JURISDICTION IN THIS COURT.

The writ of error having been taken to a judgment rendered by a State court can not be entertained unless some federal question was involved in the case in such manner as to bring the writ of error within the provisions of Section 709 of the Revised Statutes of the United States.

That section provides that "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a

treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity, is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The record shows that the defendant in error brought an action of assumpsit in the Superior Court of the State of Delaware in and for New Castle County against the plaintiff in error and filed his declaration in said action on the common counts. As to two of those counts, viz: (1) money had and received, and (2) money due for work and labor, a bill of particulars was filed in said suit in the words following, to wit:

"*First.* Money had and received by the defendant in this cause to and for the use of the said plaintiff to a large amount, to wit, the sum of two thousand eight hundred and ninety-eight dollars and eighteen cents, with legal interest thereon from the time the said defendant so had and received the same, to wit, from the twenty-ninth day of August, A. D. 1882; said sum of money having been paid by the United States of America to the said defendant for the pilotage and hire or service of a certain steam vessel, to wit, the 'Swan,' formerly owned by the said defendant, and the said plaintiff being at the time of said payment, and ever since, entitled, as against the said defendant, to receive said money, so paid as aforesaid.

Second. Money due and owing at the time of the commencement of this cause from the said defendant to the said plaintiff to a large amount, to wit, the sum of five thousand dollars, for the work, labor, care and diligence of the said plaintiff before that time

done, performed and bestowed in and about the business of the said defendant, at the request of the said defendant, to wit, in and about the prosecution of a certain claim of the said defendant against the United States of America, amounting to a large sum of money, to wit, five thousand seven hundred and ninety-six dollars and thirty-six cents, for the pilotage and hire or service of a certain steam vessel, to wit, the 'Swan,' formerly owned by the said defendant."

On the general issue joined on these two counts the case went to trial. Under the first count for "money had and received" there was evidence on behalf of the plaintiff tending to show that the steamboat company, having abandoned its claim against the United States as worthless, agreed with the plaintiff that he should have the proceeds thereof if he would at his own cost and charges prosecute the same to collection and that the plaintiff did so prosecute said claim and the steamboat company did thereafter receive a certain sum of money as the proceeds thereof; and the plaintiff claimed that he was entitled to recover the same as money had and received by the defendant to his, the plaintiff's, use.

Under the second count there was evidence on behalf of the plaintiff that through a period of more than two years he bestowed work, labor, care and diligence upon the prosecution of said claim of the steamboat company against the United States; and the plaintiff claimed from the steamboat company under an indebitatus count a quantum meruit compensation thereof.

In answer to the claim under the first count as above stated the defendant at the nisi prius trial prayed the said Superior Court to instruct the jury that any such agreement or understanding between the plaintiff and defendant with respect to the proceeds of the said claim against the United States as was claimed by the plaintiff to be the foundation of his right to recover for money had and received, was void under Section 3477 of the Revised Statutes of the United States, and that no recovery could be had under that count. Section 3477 above mentioned is as follows: "All transfers and assignments made of any claim upon the United States,

or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of, at least, two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgements of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

As to the contention in regard to the effect of the federal statute above quoted, the court charged the jury as follows:

"That the company could not legally assign its claim by gift or otherwise to the plaintiff. Still, if the jury are satisfied from the evidence that he secured it by his efforts and expenditures in the production of the necessary proof, he is entitled to recover upon the count for money had and received, for the money received, by the company was his money, and the company cannot be allowed in this action or under such a count to shelter itself under any defence of the illegality of the contract inter sese."

In answer to the claim under the second count for work and labor as above stated, the defendant at the trial prayed the said Superior Court to instruct the jury that under the facts proved in the case, the plaintiff was not entitled to recover for his work and labor performed in the prosecution of said claim. The court, however, with respect to the right of the plaintiff upon the facts in the case to recover under the second count, charged the jury as follows:

"The plaintiff may recover under the count for work and labor, under the circumstances shown by the proof of the plaintiff,

if the jury believe it, such proof being that the directors furnished the plaintiff, upon his request, with the means—through its books and accounts—of prosecuting the claim. If, therefore, the company would avail itself of the fruits of the plaintiff's work and labor and services, it should pay him what they were worth—the same as a man who sees another working in his cornfield among other hired laborers, should pay him what his labor was worth, if the jury in such case should be satisfied that there was from the circumstances evidence of a hiring. That the question in the case in hand, as well as in that cited, was for the jury upon the facts proved."

The jury rendered a general verdict in favor of the plaintiff assessing his damages at the sum of three thousand one hundred and seventy-nine dollars and eighty-one cents, being an amount nearly two hundred dollars less than the amount proved to have been received by the defendant with interest thereon to the day of the finding.

The charge of the court to the jury having been excepted to by the defendant and a bill of exceptions signed by the presiding judge, a writ of error was sued out of the Court of Errors and Appeals of the State, which brought before that court the whole record including the bill of exceptions. Upon the assignments of errors the federal question raised below, viz., that no recovery could be had on any agreement that the plaintiff should receive the proceeds of the claim of the steamboat company against the United States, by reason of Section 3477 of the Revised Statutes of the United States, was presented. This was the only federal question involved in the case. No other is disclosed by the record. And by the record it is apparent that this question had relevancy solely to the claim of the plaintiff as made under the first count of his declaration—that for money had and received as specially set forth in the bill of particulars. It is too plain for argument that the federal question raised under Section 3477 of Revised Statutes which forbids assignments or transfers of claims against the United States until after allowance, etc., was solely whether that section barred a recovery under the first count wherein the money received

by the defendant from the United States was claimed by the plaintiff as ex equo et bono had and received for his use by reason of the alleged understanding or agreement that he should receive the proceeds of said claim.

The judgment brought here for review is that of the Court of Errors and Appeals of the State, and in examining the record to discover whether or not there is any federal question so involved as to give this court jurisdiction, this court will look at the opinion of the State court of last resort a copy of which, in conformity with the requirements of rule 8, is annexed to and transmitted with the record. Since the enactment of the second section of the judiciary act of 1867 repealing and supplying the twenty-fifth section of the act of 1789, there has been little doubt that the Court may thus aid itself, irrespective of rule 8.

Murdock vs. City of Memphis, 20 Wall., 590, 633.

The promulgation of rule 8 would seem to settle the construction given by this court to the act of 1867 in this regard.

McManus vs. O'Sullivan, et. al., 91 U. S. 578, 579.

Phila. Fire Association vs. New York 119 U. S. 110, 116.

Walter A. Wood Co. vs. Skinner, 139 U. S. 293.

San Francisco vs. Itsell, 133 U. S. 65.

Kreiger vs. Shelby Railroad Co., 125 U. S. 39.

It certainly seems to be the settled practice of this court to examine opinions annexed to and transmitted with the record pursuant to rule 8.

Hammond et al. vs. Johnston et al., No. 114, Oct. Term 1891, U. S. Sup. Ct.

Ferry et al. vs. County of King et al., No. 1377, Oct. Term 1891, U. S. Sup. Ct.

City of New Orleans et al. vs. New Orleans Water Works Co. et al., Nos. 632 and 639, Oct. Term, 1891, U. S. Sup. Ct.

Henderson Bridge Co. et al. vs. City of Henderson, No. 1007, Oct. Term, 1891, U. S. Sup. Ct.

Marrow vs. Brinkley, 129, U. S., 178.

Bolling vs. Lersner, 91, U. S., 594.

The question before this court for decision is, not whether the Superior Court of the State erred in rendering the original judgment, but whether the Court of Errors and Appeals of the State erred in affirming the judgment of the Superior Court, and in so affirming that judgment decided a federal question in such manner as to give this court jurisdiction to correct the error. The rules of judicial decision which govern this court in entertaining or declining to entertain jurisdiction of cases brought before it in error from the highest court of the State are well settled by numerous adjudications.

In order that this court may entertain jurisdiction under Section 709 of the Revised Statutes, it must appear affirmatively from the record transmitted to this court either with or without an inspection of the opinion annexed thereto pursuant to rule 8, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Walter A. Wood Co. vs. Skinner, 139 U. S. 293.
Cook County vs. Calumet & Chicago Canal Co., 138 U. S. 635.
Blount vs. Walker, 134 U. S. 607.
San Francisco vs. Itsell, 133 U. S. 65.
Marrow vs. Brinkley, 129 U. S. 178, 181.
De Saussure vs. Gaillard, 127 U. S. 216.
New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., 125 U. S. 18, 29.
Adams County vs. Burlington & Mo. R. R. Co., 112 U. S. 123, 127.
Detroit Railway Co. vs. Guthard, 114 U. S. 133.
Chouteau vs. Gibson, 111 U. S. 200.
Brown vs. Atwell, Administrator, 92 U. S. 327.
Citizens' Bank vs. Board of Liquidation, 98 U. S. 140.
Bolling vs. Lersner, 91 U. S. 594.
City of New Orleans et. al. vs. New Orleans Water Works et. al. Nos. 632 and 639 Oct. Term 1891 U. S. Sup. Ct.

In the case last above cited this court say:

"In order to sustain the jurisdiction of this court upon the ground that a federal question is presented it should appear either that such question was apparent in the record, and that a decision was made thereon, or that, from the facts stated, such question must have arisen and been necessarily involved in the case. If it appear either that the decision of the State court was made upon rules of general jurisprudence, or that the case was disposed of upon other grounds, broad enough in themselves to sustain the judgment without considering the federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach."

In *Henderson Bridge Co. et. al. vs. City of Henderson, No. 1007, Oct. Term, 1891* this court say:

"Although a federal question may have been raised in the State court, yet if the case was decided in that court on grounds not involving a federal question, but broad enough to sustain the decision, this court will refuse to entertain jurisdiction."

And where the case might properly have been determined upon a ground broad enough to support the judgment without consideration of any federal question raised therein, and it does not appear upon what ground the State court based its decision, this court will not entertain jurisdiction.

In *Walter A. Wood Co. vs. Skinner, 139 U. S. 293, 297,* this court say:

"It does not appear upon what ground the Court of Appeals proceeded in affirming this judgment, but as the case might properly have been determined upon a ground broad enough to support the judgment without resort to a federal question, this court has no jurisdiction."

It is further well settled that where both a federal question and a non-federal question have been raised and decided in the case and the decision of the latter question has been upon a ground independent of the federal question and broad enough to sustain the judgment, the writ of error will be dismissed by this Court without considering the federal question.

Hopkins vs. McLure, 133 U. S. 380, 386.
Hale vs. Akers, 132 U. S. 554, 565.
Adams County vs. Burlington & Mo. R. R. Co., 112 U. S. 123.
Hammond et. al. vs. Johnston et. al. No. 114, Oct. Term 1891, U. S. Sup. Ct.

In the case last above cited this court say:

"It is well settled that where the Supreme Court of a State decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

And to the same effect this court in Beatty vs. Benton, 135 U. S. 244, 254, say:

"The case was decided against the plaintiffs in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment. In such a case, even though the State court also decides a federal question against the plaintiffs in error, this court dismisses the writ of error without considering the federal question."

It is further well settled that where in a case both a federal question and a non-federal question are raised and decided and the determination of the case upon the latter question is based upon a ground broad enough to sustain the judgment, this court will not entertain jurisdiction, although it may appear that the decision by the State court of the non-federal question was unsound or erroneous.

Klinger vs. State of Missouri, 13 Wall. 257.
Murdock vs. City of Memphis, 20 Wall. 590.
Jenkins vs. Loewenthal, 110 U. S. 222.
De Saussure vs. Gaillard, 127 U. S. 216.
Hale vs. Akers, 132 U. S. 554.
Beaupre vs. Noyes, 138 U. S. 397.

In Klinger vs. State of Missouri, *supra*, this court say, p. 263;

"The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the

judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law the raising federal question, and this court will then take jurisdiction."

In *Murdock vs. City of Memphis, supra,* this court say, *p. 635:*

"Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

1. That it is essential to the jurisdiction of this court over the judgment of a State court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State court.

2. That it must have been decided by the State court, or that its decision was necessary to the judgment or decree, rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States.

4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

5. If it finds that it was rightly decided, the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other

matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. It this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require."

In De Saussure vs. Gaillard, *supra*, p. 233, this court say:

"It is a well settled rule, limiting the jurisdiction of this court in such cases, that 'where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one.'"

Again this court in Hale vs. Akers, *supra*, p. 564, say:

"In Murdock vs. City of Memphis, 20 Wall. 590, 636, this court announced, as one of the propositions which flowed from the provisions of the second section of the act of February 5, 1867, 14 Stat. 386, embodied in section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a federal question was erroneously decided against the plaintiff in error, the court must further inquire whether there was any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in

deciding the issued raised by the federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue. This principle has since been repeatedly applied. In Jenkins vs. Loewenthal, 110 U. S. 222, where two defences were made in the State court, either of which, if sustained, barred the action, and the one involved a federal question and the other did not, and the State court in its decree sustained them both, this court said that, as the finding by the State court of the fact which sustained the defence which did not involve a federal question was broad enough to maintain the decree, even though the federal question was wrongly decided, it would affirm the decree, without considering the federal question or expressing any opinion upon it."

In Beaupre vs. Noyes, *supra*, this court say with reference to the holding by the State court p. 402:

"That view does not involve a federal question. Whether sound or not, we do not inquire. It is broad enough, in itself, to support the final judgment, without reference to the federal question, and for that reason the judgment must be affirmed."

It is thus settled beyond controversy that if the judgment of the Court of Errors and Appeals in this case was based upon a ground independent of the federal question under Section 3477 of the Revised Statutes and broad enough to sustain the decision made by that court, the writ of error should be dismissed without regard to the views of this court as to the soundness or unsoundness of that decision.

Looking at the record in connection with the opinion of the Court of Errors and Appeals sent up with the record in obedience to rule 8, it is apparent that it was decided by that court that the verdict of the jury in the Superior Court was to be taken as rendered under the second count, which was for a quantum meruit compensation, for work and labor. That the verdict was to be taken as so rendered was a matter relating solely to the law and practice of the State, and its determination by the State court of last resort is conclusive; and it is so considered by the plaintiff in error, as no assignment of error has been made in this regard. As

has already appeared the charge delivered to the jury in the Superior court was clearly broad enough to warrant the finding of a verdict for the plaintiff under the secund count. There was thus a distinct substantive issue on the pleadings and evidence submitted by the court to the jury, which could in no way involve the question of assignment or transfer of a claim under section 3477 of the Revised Statutes. The claim under the second count for a quantum meruit compensation for work and labor precludes all idea of any other promise or agreement, of which such work and labor were the consideration, than the promise, whether expressed or implied by law, that the defendant would pay for the work and labor of the plaintiff as much as it should be reasonably worth. The claim of the plaintiff under the second count was therefore wholly independent of and unconnected with any question raised in the case under section 3477 of the Revised Statutes.

The record discloses that the case was submitted by the Superior Court to the jury on the second count and that a verdict was rendered for the plaintiff, upon which judgment was entered.

The opinion of the Court of Errors and Appeals shows that this judgment was affirmed on the ground that the verdict of the jury is to be taken as rendered on the second count, a decision which, as above stated, concerns the law and practice of the State, and as to which no assignment of error has been made. The Court of Errors and Appeals in their opinion say:

"This court in affirming the judgment below do so for the reason that the finding of the jury under the second count for work and labor done, being in favor of the plaintiff below, there was no error in the rendition of the judgment by the court below, upon such finding of the jury. The court declines to render any decision upon any other questions raised in the cause in the arguments of counsel, because it considers such questions as irrelevant."

It therefore expressly appears that the Court of Errors and Appeals affirmed the judgment of the court below as having been rendered on a verdict found under the second count. And it is submitted that under the circumstances disclosed in the case it was competent for the jury to render that verdict. For whether the

work and labor performed by the plaintiff in behalf of the defendant were at its express request, or were induced through the furnishing to him by the defendant of facilities for the prosecution of its claim against the United States, in either case the defendant was under an obligation to pay to the plaintiff reasonable compensation for his services. Under such a count as the second count the promise implied by law upon proof of the fact from which it is alleged to arise, is a fiction which is recognized by the law for the purpose of doing substantial justice between the parties.

Langdell, Summary of the law of Contracts, Section 95.

But whether the decision of the Court of Errors and Appeals in affirming the judgment of the Superior Court under the second count was sound or unsound is, as has been shown, wholly immaterial, for the reason that the second count was broad enough to sustain the judgment, and was wholly independent of the first count.

It is therefore submitted that manifestly the decision of no federal question was involved in or necessary to the judgment of the State court of last resort in this case; that none was decided by it, and that this writ of error should be dismissed.

II.

IF THE WRIT OF ERROR IN THIS CASE SHOULD NOT BE DISMISSED FOR WANT OF JURISDICTION, THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED ON THE MERITS.

The judgment of the court below should not be reversed unless error is clearly disclosed upon the record; for every presumption is to be made in support of the judgment.

Perminter vs. Kelley, 18 Ala., 716.

Thompson vs. Monrow, 2 Cal., 99.

Wagers vs. Dickey, 17 Ohio, 439.

In the last case the court say: "A revisory court never presumes that an inferior tribunal has erred. The presumption is that it has not. Until the contrary is shown by record, every court is presumed to have acted and decided correctly."

Nor will the judgment of the court below necessarily be reversed because error has been committed, unless that error is of such a character as to seriously affect the party complaining of the judgment; and if it appears that, upon the law and facts of the whole case as disclosed by the record, justice has been done by the court below, the judgment will not be reversed on account of erroneous instructions.

Gibbons vs. Dillingham, 10 Arkansas, 9.

Casteel vs. Casteel, 8 Blackford, 240.

Creevy vs. Cummins, 3 La. Ann., 163.

In the last case the court say: "As the decree appears to have done justice between the parties, we must let it stand, whether the District Judge was right or not in the legal principles which he applied to the case."

It is submitted that upon due examination no error will be discovered in the judgment below.

First and Second Assignments of Error.

It will be convenient to consider these two assignments together. They are as follows:

1. That the court below, to wit, the Court of Errors and Appeals of the State of Delaware, erred in not reversing the judgment of the Superior Court of the State of Delaware for New Castle County on the ground set forth in the first assignment of error in the said Court of Errors and Appeals, to wit:

"1. That the said Superior Court erred in charging the jury that if the jury should be satisfied from the evidence that the directors of the defendant company agreed that the plaintiff should have whatever he could collect from the United States Government upon the claim of said company against it, the plaintiff bearing all the expenses of the effort for such collection, then there

was a valid legal agreement initiated between the parties that was consummated when the plaintiff expended any money or rendered any service in the prosecution of the claim, which but for such understanding the plaintiff would not have spent or rendered."

2. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the second assignment of error in the said Court of Errors and Appeals, to wit:

"2. That the said Superior Court erred in charging the jury that the declaration of the directors that if the plaintiff would proceed for the claim of the defendant and recover anything upon it he might have it was in the nature of an offer on their part, which, when accepted by the plaintiff acting upon it and expending his time and money in the recovery of the claim, bound the company, such agreement being within the authority of the directors under the charter of the company."

The portion of the charge thus excepted to is in substance that the agreement by the directors that the plaintiff should have whatever might be collected upon the defendant's claim against the United States, he bearing all the expense of the collection, followed by the expenditure of time, labor and money, by the plaintiff, in the prosecution and recovery of the claim, constituted a valid legal contract binding upon the company.

In this charge it is submitted there was no error.

There was consideration sufficient to support the contract, although the defendant might not receive any benefit from it. For either benefit to the defendant or detriment to the plaintiff is sufficient consideration.

Leake on Contrs., 611. Addison on Contrs., 17, 18.

And it was not necessary that the contract should be created or evidenced either by the seal or the formal vote of the corporation.

Bank of U. S. vs. Dandridge, 12 Wheat., 64, 68, 69, 70, 72, 79, 80, 82, 83.

Morawetz on Private Corp. § 167.

Bank of Columbia vs. Patterson's Admr. 7th Cranch, 299.

But it is objected that the purpose of the contract was to part with the property of the defendant, without the receipt by the defendant of any consideration or benefit therefor, and that it was beyond the power or authority of the directors to bind the defendant as a party to the contract.

While it is generally true that directors are not authorized to give away the property of the corporation, it is not universally true.

Morawetz on Private Corp., § 233.

But the contract in this case cannot properly be considered as one giving away the property of the defendant.

Directors and stockholders considered the claim of the company against the United States absolutely worthless, declared "that there was no use in throwing good money after bad," and declined to prosecute the claim for the company. There was no contradiction in the testimony on this point.

The rule which generally prevents directors from parting with the property of their company without consideration must receive a reasonable construction; and, so construed, it could not prohibit the directors from entering into the agreement in this case.

The claim did not appear to the directors to have any more value than a loose anchor at the bottom of the sea.

They considered it utterly without value and refused to prosecute it.

Unless the plaintiff had taken hold of it, in all human probability it never would have been realized.

The directors had the right, and it was their duty to determine whether the claim of the company had any value in it. They had the right to decline to prosecute claims that seemed to them to be desperate, and to compromise claims that seemed to them to be doubtful.

Morawetz on Private Corp., §§ 233, 423.

Having determined that there was no value in the claim, how can it be said that their agreement with the plaintiff was to give away the property of the defendant?

Did not the determination of the directors, which they were

empowered to make, estop the defendant, after the plaintiff had expended his time, labor and money, from claiming that they entered into a contract to give away the property of defendant?

The question whether the contract was one for the giving away of the property of the defendant must be determined in view of the facts as they existed at the time the contract was entered into.

If the claim then appeared to the directors to be substantial, it was their duty to prosecute it on behalf of the company; but if it then appeared to them to be shadowy and unreal, the company cannot now take advantage of the labor of the plaintiff to his detriment.

The directors had just as much right to enter into the contract with the plaintiff as to give to the plaintiff a dead horse of the defendant, he removing it from the defendant's premises at his own expense.

But, upon the assumption that the agreement between the plaintiff and defendant can be properly considered as one giving away the property of the defendant, it is submitted that the directors had authority to enter into it on behalf of the defendant.

It was certainly not beyond the power of the defendant to enter into such a contract; and under its charter the directors were empowered to bind it in that behalf.

The charter provides that "the business and concerns of the "said corporation shall be managed by seven directors, who "shall be stockholders."

It also provides that "the president and directors shall have "the power, from time to time, to increase the capital stock to "such an amount as may be deemed necessary for the accomplish-"ment of the objects of this corporation."

With these unusual and extensive powers vested in them, it is submitted that the directors possessed the whole power of the corporation, so far as authority to enter into the agreement with the plaintiff is concerned.

But, even if the contract had originally been unauthorized by the defendant's charter, it not being forbidden by the charter or

any other law, and having been executed by the plaintiff, is now to be treated as valid.

Morawetz on Pri. Corp. Secs. 85, 86, 100, 103, 104, 105, 107.
Hitchcock vs. Galveston, 96 U. S., 341, 350, 351.
Railway Co. vs. McCarthy, 96 U. S., 258, 257.
Township of Pine Grove vs. Talcott, 19 Wallace, 666, 678.
Gold Mining Co. vs. Nat. Bank, 96 U. S., 640, 641, 642.
Chester Glass Co. vs. Dewey, 16 Mass., 94, 102.
Whitney Arms Co. vs. Barlow, 63 N. Y., 62.
Oil Creek, &c., R. R. Co. vs. Penn. Trans. Co., 83 Penn. St., 160.
Parish vs. Wheeler, 22 N. Y., 494.
State Board, &c. vs. Citizens' St. Railway Co., 46 Ind., 407.
National Bank vs. Matthews, 98 U. S., 621.
Steam Navagation Co. vs. Weed, 17 Barb., 378.
De Groff vs. Am. Linen Thread Co., 21 N. Y., 124, 127.
Union Water Co. vs. Murphey's Flat Fluming Co., 22 Cal., 620, 630.
Underwood vs. Newport Lyceum, 5 B. Monroe, 129.
Darst vs. Gale et al., 83 Ill., 136, 140.
Bradley vs. Ballard, 55 Ill., 413, 417.
Argenti vs. City of San Francisco, 16 Cal., 255, 256, 264.
E. St. Louis vs. E. St. Louis Gas L. and Coke Co., 98 Ill., 415.
Bank vs. Hammond, 1 Richardson (S. C.), 281, 288.
Newburg Petroleum Co. vs. Weare, et al., 27 Ohio St., 343, 354.

And it is immaterial whether in fact a person dealing with a corporation has had disclosed to him its want of corporate authority to perform the act or enter into the contract, for he is presumed to know the contents of its charter.

Morawetz on Private Corp., § 64.

Therefore the rule above stated as to the binding force of executed contracts, unauthorized by charter, equally applies, whether the party dealing with the corporation in fact had or had not knowledge of its want of authority in that behalf.

The first and second assignments of error should therefore be overruled.

THIRD ASSIGNMENT OF ERROR.

3. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the third assignment of error in the said Court of Errors and Appeals, to wit:

"3. That the said Superior Court erred in charging the jury that though the company could not legally assign its claim, by gift or otherwise, to the plaintiff, still if the jury were satisfied from the evidence that the plaintiff secured the claim by his efforts and expenditures in the production of the necessary proof he was entitled to recover upon the count for money had and received, for the money received was his money and the company could not under such a count defend itself on the ground of the illegality of the contract."

This charge was clearly correct, and is amply supported by authority.

Aside from its legality, the contract having been executed on the plaintiff's part, and nothing remaining but a money payment on the part of the defendant, the common count for money had and received is proper.

2 Greenl. on Ev., § 104.

Hurlock vs. Copperthwaite, 2 Hous., 550.

Bank of Columbia vs. Patterson's Adm'r, 7 Cranch, 299.

And the count for money had and received is peculiarly appropriate under the circumstances.

Leake on Contrs., 87, 88, 104, note c.

Moses vs. Macferland, 2 Burrows, 1005, 1008, 1010, 1012.

Guthrie vs. Hyatt, 1st Harr., 446.

Assuming, for the sake of the argument, that the contract or agreement between the plaintiff and defendant was illegal, still the plaintiff's labor and expenditure having resulted in the receipt by the defendant of a certain sum of money, the defendant was bound to account to the plaintiff for the benefit thus received.

Morawetz lays down the rule: "If a contract entered into by "a corporation is not enforceable by reason of any of the rules "heretofore stated, either party may be compelled to account for "the benefits received, unless the transaction was so illegal or im- "moral that the court cannot, consistently with public policy, grant "a remedy to either party."

Private Corp. Rule 14, p. 120.

The same author says: "If a corporation, or a party contracting with a corporation, has received benefits under an attempted agreement which was defective for want of the mutual consent of the parties, or which cannot be enforced on account of some rule of law, an action may be sustained, without reference to the agreement, to recover whatever may be equitably due for the value received. * * * If either party to a contract which cannot be enforced on account of some prohibition of the law has received benefits under the contract, he must account for such benefits to the other party. In such case the maxim, '*in pari delicto melior est conditio possidentis*,' applies only if the contract involves some immorality, or if the courts must, for reasons of public policy, refuse to help either party. * * * These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations in contravention of the statutory or common law; and although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received."

Private Corp. Secs. 121, 125.

But there was no illegality involved in the transaction between the plaintiff and defendant.

The third assignment of error should therefore be overruled.

Fourth Assignment of Error.

4. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the fourth assignment of error in the said Court of Errors and Appeals, to wit:

That the said Superior Court erred in not charging the jury according to the 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th of said prayers of the defendant company as the same appears in the record.

There is a two-fold answer to this assignment of error, viz:

1. The record discloses the fact that there was no such assignment of error in the Court of Errors and appeals as is mentioned in the fourth assignment of error in this court; the fourth assignment of error in the court below being "That the court erred in not charging the jury according to the prayers of the defendant company."

2. Some of the instructions prayed for by the defendant in the prayers mentioned in the fourth assignment of error in this court were manifestly improper as will hereinafter be shown. This assignment of error, being general as to all of the prayers therein mentioned, must therefore be overruled.

Worthington vs. Mason, 101 U. S. 149.

Fifth Assignment of Error.

5. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the seventh assignment of error in the said Court of Errors and Appeals, to wit:

"7. That the said Superior Court erred in not charging the jury that it is the duty of the company to rescind an unexecuted contract or gift if the same is ultra vires or prohibited by law, as prayed for in the fifth prayer of the defendant company."

What legal sense may attach to the words "unexecuted gift," it is difficult to determine.

If the words "unexecuted contract" were used in the sense of a contract wholly unexecuted, the question presented by the prayer was purely speculative, and had no legitimate application to the case as disclosed by the record.

If, on the other hand, these words were used in the sense of a contract not wholly executed, the instruction prayed for is not law.

Morawetz says: "The question, how far a contract made by "a corporation in excess of its chartered powers must be performed "by either of the parties in order to render it binding upon the "other side, seems to depend for its answer upon the peculiar "circumstances of the case. So long as the parties can be "restored substantially to their original positions by a rescission of "the contract, either party will be allowed to withdraw. But if "a rescission would be productive of injustice, the contract will be "held binding, and compensation may be enforced."

Private Corp. Sec. 107.

The instruction as prayed contains a proposition which is not law, and the fifth assignment of error should therefore be overruled.

SIXTH ASSIGNMENT OF ERROR.

6. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the eighth assignment of error in the said Court of Errors and Appeals, to wit:

"8. That the said Superior Court erred in not charging the jury that a contract or transfer of property by a corporation is absolutely void if declared void by the act of incorporation or by a general law, as prayed for in the sixth prayer of the defendant company."

The instruction prayed is an abstract proposition of law which is by no means universally true.

A contract or transfer of property by a corporation may be declared void or avoided as between certain persons by the act of incorporation or by a general law, and yet have force and operation as between other persons.

It does not necessarily follow that because a contract or transfer of property is declared void, it is therefore absolutely void.

But the instruction prayed raises merely a speculative question, not properly arising in or connected with the case; neither the charter nor any general law declaring void any contract or transfer of property involved in the case.

The sixth assignment of error should therefore be overruled.

Seventh Assignment of Error.

7. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the ninth assignment of error in the said Court of Errors and Appeals, to wit:

"9. That the said Superior Court erred in not charging the Jury that the rule aforesaid that a contract or transfer of property by a corporation is absolutely void if declared void by the act of incorporation, or by a general law, is applicable to a contract or transfer which has been partly or wholly executed by the party contracting with the corporation or receiving from it such transfer as prayed for in the seventh prayer of the defendant company."

The instruction prayed for was improper as containing an abstract proposition of law not universally true. But assuming, for the sake of the argument, that the proposition is universally true, it is purely speculative so far as this case is concerned, neither the charter nor any general law declaring void any contract or transfer disclosed in this case.

The seventh assignment of error should therefore be overruled.

Eighth Assignment of Error.

8. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the tenth assignment of error in the said Court of Errors and Appeals, to wit:

"10. That the said Superior Court erred in not charging the jury that in the case of a contract or transfer of property by a corporation declared void by the act of incorporation, or by a general law which has been partly or wholly executed by the party contracting with the corporation or receiving from it such transfer, the party dealing with the corporation cannot enforce the performance of the contract or the transfer of the property by the corporation,

or recover from it the consideration paid, or compensation for the consideration in case it was work and labor, as prayed for in the eighth prayer of the defendant company."

The proposition of law presented by the instruction prayed for is purely speculative in its relation to this case; neither the charter nor any general law declaring void any contract or transfer appearing in the record.

But the proposition of law is manifestly unsound; for, as has already been shown, although a contract or transfer by a corporation may have been forbidden by the charter or a general law the party contracting with the corporation may recover the consideration paid or compensation therefor.

Morawetz on Private Corp. Secs. 121, 125.

The instruction prayed for being unwarranted by law in part, the eighth assignment of error should be overruled.

Ninth Assignment of Error.

9. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the eleventh assignment of error in the said Court of Errors and Appeals, to wit:

"11. That the said Superior Court erred in not charging the jury that, whether the transaction between the plaintiff and defendant was a contract, agreement, or understanding to give or transfer the claim of the defendant against the United States to the plaintiff in the future or to pay him the proceeds of such claim when received by the defendant, it was within the provisions of section 3477 of the Revised Statutes of the United States, and was void, and that no action could be maintained against the defendant for the proceeds of said claim, received by it from the United States or any part thereof or for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of such gift or transfer or as the consideration for such contract, agreement, or understanding, as prayed for in the 9th prayer of the defendant company."

The instruction prayed was clearly erroneous in that it denied the right of the plaintiff, upon the assumption that the contract between the plaintiff and defendant was forbidden by section 3,477 of the United States Revised Statutes, to maintain an action against the defendant for compensation for the work and labor the plaintiff performed in the recovery of the claim.

It is true that "the plaintiff testified that all the work he performed, and all the expenses he incurred in and about the prosecution of the said claim, he did for his own individual benefit, "under the expectation of getting the money for himself, and not "for the company, and not under or because of any promise of the "company to pay him for such work or expenses, and that the "company did not make him any such promise."

But the fact remains that the company knew that he was engaged in the prosecution of its claim, assisted him by the loan of its books and papers in that behalf, and accepted the fruits of his work and labor; and thereupon became liable under an implied contract, even if the plaintiff was not entitled to the proceeds of the claim, to pay him what he was reasonably entitled to receive for his work and labor, in fact rendered in behalf of the company.

Whatever may have been the plaintiff's understanding as to compensation prior to the receipt of the money by the company, the company upon its appropriation of the fruits of his labor, became liable to pay him for his services, upon the supposition that the proceeds of the claim did not belong to the plaintiff.

Thus, even upon the assumption that the transaction between the plaintiff and the defendant came within the provisions of sec. 3477 of the U. S. Revised Statutes, the instruction prayed was untenable in part, and therefore the assignment of error should be overruled.

But the transaction between the plaintiff and defendant was not within the provisions of that statute.

Section 3,477 provides that "All transfers and assignments "made of any claim upon the United States, or of any part or "share thereof, or interest therein, whether absolute or conditional, "and whatever may be the consideration therefor, and all powers

"of attorney, orders, or other authorities for receiving payment of "any such claim, or of any part or share thereof, shall be abso- "lutely null and void, unless they are freely made and executed in "the presence of at least two attesting witnesses after the allow- "ance of such a claim, the ascertainment of the amount due, and "the issuing of a warrant for the payment thereof."

The statute thus relates and is restricted to transfers and assignments in whole or in part of claims against the United States, and powers of attorney, orders or other authorities from the defendant for receiving payment of the same.

The plaintiff did not receive either a power of attorney, order or other authority from the defendant for receiving payment of the claim.

Therefore, unless the transaction between the plaintiff and defendant was a transfer or assignment of the defendant's claim, it did not and could not come within the provisions of the United States statute.

It will hardly be claimed that subject to the provisions of the statute the defendant transferred and assigned its claim to the plaintiff.

For when, in March, 1881, the plaintiff asked the defendant to give him "a bill of sale" of the claim, that request was declined.

The transaction between the plaintiff and defendant, when analyzed according to its legal nature, resolves itself into a purely executory contract, by which the defendant, in consideration of the plaintiff's securing at his own expense and trouble the recognition and payment by the United States to the defendant of a certain claim, undertook and promised to pay the plaintiff the proceeds of said claim as soon as the same should be received by it.

Thus the transaction was a purely personal, executory contract.

It could create no lien, either at law or in equity, upon the claim, as a claim, and therefore could not, even aside from the provisions of section 3,477, operate either as a tranfer or as an assignment.

lien, sec. 3477 U. S. Revised Statutes was fatal to the claim of lien.

Trist vs. Child is a direct authority upon the proposition that such an agreement as was entered into in this case does not come within either the terms or meaning of section 3477.

The strong language of the court is Spoffard vs. Kirk, 97 U. S., 484, is referred to and evidently disapproved of in Goodman vs. Niblack, 102 U. S., 556.

In Hobbs vs. McLane, 117 U. S., 567, Peck entered into a co-partnership with a view of performing a contract he was expecting to receive from the United States, and by the articles of co-partnership his co-partners would be entitled to receive a portion of the moneys which should be collected from the United States.

After the work had been performed Peck gave to his co-partners notes payable out of money he might thereafter receive on account of his claim against the United States. His co-partners filed a bill in equity against his assignee in bankruptcy for a settlement of the partnership concern. It was held that neither the articles of co-partnership nor the notes were forbidden either by section 3477 or by section 3737, of the United States Revised Statutes.

The court say: "We are of opinion that the partnership con-"tract was not opposed to the policy of the statute. The sec-"tions under consideration were passed for the protection of the "Government. Goodman vs. Niblack, 102 U. S., 556. They "were passed in order that the Government might not be harrassed "by multiplying the number of persons with whom it had to deal, "and might always know with whom it was dealing until the "contract was completed and a settlement made. Their purpose "was not to dictate to the contractor what he should do with the "money received on his contract after the contract had been per-"formed."

The court then treated the notes as not contravening the statute.

Thus this court has authoritatively established the proposition

that section 3477 does not apply to an executory contract such as is disclosed in this case.

And this court has gone further and given section 3477 a reasonable construction in its relation to transfers or assignments.

In Erwin vs. United States, 97 U. S., 392, it was held that the statute applied only to cases of voluntary assignment or transfer, and not to assignments or transfers by operation of law; thus restricting the generality of the words.

Finally, this court has determined that the intent of the statute is the protection of the government and not of the party to the assignment or transfer, and that therefore the assignment or transfer is void only as against the United States.

In Goodman vs. Niblack, 102 U. S., 556., Mr. Justice Miller, delivering the opinion of the court, states that a consideration of the mischiefs designed to be remedied by the statute, "as well as a "careful examination of the statute, leave no doubt that its sole "purpose was to protect the government, and not the parties to the "assignment."

In Bailey vs. United States, 109 U. S., 432, the court approved of the doctrine laid down in Goodman vs. Niblack, 102 U. S., 556. Speaking of the United States vs. Gillis, 95 U. S., 407; Spofford vs. Kirk; Erwin vs. United States, and Goodman vs. Niblack, the court say: "These cases show that the statutes in "question are not to be interpreted according to the literal accept-"ance of the word used. * * * The purpose of Congress by "the enactments in question was to protect the government against "frauds upon the part of claimants, and those who might become "interested with them in the prosecution of claims, whether before "Congress or the several departments. The title of the act of 1853 "suggests this purpose. It is to prevent fraud upon the Treasury. "An effectual means to that end was to authorize the officers of the "government to disregard any assignment or transfer of a claim, or "any power of attorney to collect it, unless made or executed after "the allowance of the claim, the ascertainment of the amount due "thereon, and the issuing of the warrant for the payment thereof."

In St. Paul Railroad vs. United States, 12 U. S., 733, and

Flint and Pere Marquette Railroad Co. vs. United States, 112 U. S., 762, the assignment of a claim against the United States was treated as void as against the United States, and this was the extent of these two decisions.

And in the latest case upon the subject the court declared, as has been shown, that the purpose of the statute "was not to dictate "to the contractor what he should do with the money received on "his contract after the contract had been performed."

Hobbs vs. McLane, 117 U. S., 567.

The case of Freedman's Saving Co. vs. Shepherd, 127 U. S. 494, strongly supports the position of the defendant in error in this regard.

Thus the transaction between the plaintiff and defendant was not avoided by section 3477.

But even if it were, as has already been shown, the defendant should not be permitted to retain the benefits that it has received.

In Brooks vs. Martin, 2 Wall., 70, it appeared that a partnership had been formed for the purpose of buying up soldiers' claims for bounty land before any scrip or land warrants were issued. The purpose of the co-partnership agreement was illegal being in direct contravention of the act of Congress of February 11, 1847. That act provided for the issuing of warrants to soldiers for a certain quantity of land each and also provided that any sale or contract going to affect the title or claim to any such bounty made prior to the issue of the warrant should be "null and void to all intents and purposes whatsoever." The co-partnership thus formed having engaged in the illegal traffic and all of the claims purchased by the firm having been turned into land warrants and such warrants having been sold or otherwise disposed of, Martin filed a bill in equity against Brooks for an account and division of the profits of the co-partnership. The case having been brought to this court, it was strenuously urged that the partnership having been formed for an illegal purpose, Martin was not entitled to maintain his bill for an account and division of the proceeds of the illegal traffic. This court, however, decided that Martin was entitled to the relief

prayed for and affirmed the decree of the court below in his favor. The court say, p. 79:

"When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice, as between himself and his partners; or what rule of public morals will be weakened by compelling him to do so. The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case. In Sharp vs. Taylor, a case in the English Chancery, the plaintiff and defendent were partners in a vessel, which, being American built, could not be registered in Great Britain according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this condition, she made several trips, which were profitable; and the defendant, colluding

with Robertson, the American agent, in whose name the vessel had been registered, refused to account with plaintiff for his share of the profits, or to acknowledge his interest in the ship. When plaintiff brought his suit in Chancery in England, the defendant set up the illegality of the traffic, and the violation of the navigation laws of both governments, as precluding the court from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor Cottenham, and from his opinion we make the following extracts: 'The answer to the objection appears to me to be this, that the plaintiff does not ask to enforce any agreement, adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor (the defendant) received the money; and the plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision of some act of Parliament has been violated or neglected? * * * The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. * * * The difference between enforcing illegal contracts, and asserting title to money which has arisen from them, is distinctly taken in Tenant vs. Elliot, and Farmer vs. Russell, and recognized and approved by Sir William Grant in Thomson vs. Thomson.' These cases are all reviewed in the opinion of this court in the case of McBlair vs. Gibbes, and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound, and that it is directly applicable to the case before us."

The ninth assignment of error should therefore be overruled.

Tenth Assignment of Error.

10. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the twelfth assignment of error in the said Court of Errors and Appeals, to wit:

"12. That the said Superior Court erred in not charging the jury that, whether the transaction between the plaintiff and defendant was a contract, agreement, or understanding to give or transfer the claim of the defendant against the United States to the plaintiff in the future, or to pay to the plaintiff the proceeds of such claim when received by the defendant, it was within the provisions of section 3477 of the Revised Statutes of the United States and was void, as prayed for in the 9th prayer of the defendant company."

This assignment of error should be overruled for reasons already given.

Eleventh Assignment of Error.

11. That the said court below erred in not reversing the judgment of the said Superior Court on the ground set forth in the thirteenth assignment of error in the said Court of Errors and Appeals, to wit:

"13. That the said Superior Court erred in not charging the jury that no action could be maintained against the defendant for the proceeds of said claim received by it from the United States or any part thereof, or for compensation for the work and labor of the plaintiff performed in the recovery of said claim as the consideration of a gift or transfer of said claim by the defendant to the plaintiff or as the consideration for a contract, agreement, or understanding to give or transfer said claim to the plaintiff in the future or to pay him the proceeds of said claim received by said defendant from the United States or any part thereof, as prayed for in the 9th prayer of the defendant company."